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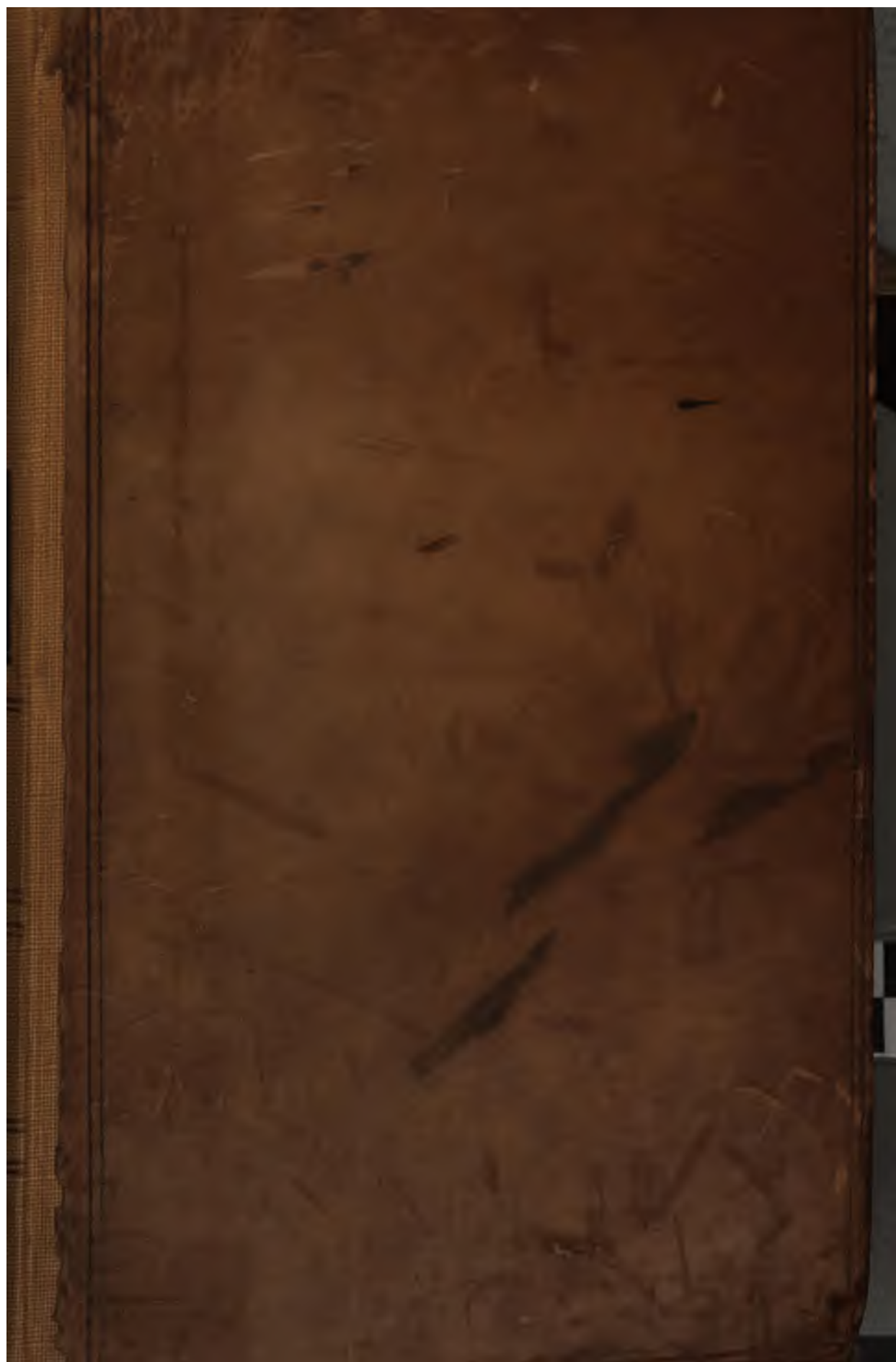
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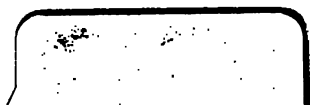
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS
AT
Doctors' Commons.

By W. C. CURTEIS, LL.D.
ADVOCATE.

VOL. III.
CONTAINING CASES FROM HILARY TERM, 1842, TO
TRINITY TERM, 1844, INCLUSIVE.

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1842. tor of the respondent *under protest* ; and an act on
 HILARY TERM, petition was entered into.
 Jan. 11th.

HARRISON
 against
 SPARROW.

In support of the protest, it was alleged, that in the first instance this was a cause of nullity of marriage by reason of impotence, brought by Jane Sparrow, spinster, falsely called Harrison, and the wife of Fiske Goodeve Fiske Harrison, against the said F. G. F. Harrison, in the Consistorial Court of London : that the citation, issued in the said cause, was returned, and an appearance given thereto, and a libel prayed, on the extra Court day after Michaelmas Term, 5th of August, 1840 : that the libel was brought in on the first session of Michaelmas Term, (1840), and was admitted as reformed on the bye day after that Term, (its admission as brought in having been opposed by counsel on behalf of the defendant,) when the fact of marriage pleaded in the libel was confessed, but otherwise a negative issue was given to the libel : that on the second session of Hilary Term, (1841), the said F. G. F. Harrison appeared personally, and gave in his answers to the libel : that on the third session of the said Term, a monition was decreed against the said F. G. F. Harrison, to undergo (as usual in such suits,) an inspection of his person, before certain inspectors, then appointed, in the presence of the proctor of the said F. G. F. Harrison, who then undertook for, or declared, his said party's willingness to undergo such inspection, that on the faith of such undertaking, an appointment, whereof the said F. G. F. Harrison had due notice, was made with the inspectors, but that the said F. G. F. Harrison, notwithstanding the premises, declined attending, and refused to attend such, or any other,

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cause was assigned to be concluded. That on the first extra Court day after the same, (15th of July, 1841,) the cause was concluded, and was assigned for informations and sentence on the next Court day, and that on the next Court day, (22nd of July, 1841,) the said cause was heard, after hearing whereof the Right Honourable the Judge was pleased to pronounce, by his interlocutory decree, having the force and effect of a definitive sentence in writing, the sentence of nullity of marriage prayed on behalf of the said Jane Sparrow, and to condemn the said F. G. F. Harrison in costs.

That all and singular the proceedings aforesaid had and done from and after the third session of Easter Term, (1841), were so had and done, and that the sentence of nullity pronounced in the said cause was so pronounced *in pain* of the said F. G. F. Harrison and his proctor thrice called and not appearing: wherefore, it was prayed that the inhibition might be relaxed, and the said F. G. F. Harrison condemned in costs.

On behalf of Mr. Harrison, in support of the appeal, his proctor alleged that his party was not, by reason of his having been so pronounced in contempt, as alleged on behalf of the other party, barred or prevented from prosecuting any appeal to this Court, and that the inhibition ought not of right to be relaxed: that after his said party had been so pronounced in contempt by the said Judge of the Consistory Court, to wit, on the 7th day of May last, being the third session of Easter Term, 1841, and on the same day the said Judge had decreed such his contempt to be signified pursuant to the stat. 53 Geo. 3, c. 127, a significavit duly

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be, as the same were, stayed forthwith, and which were agreed to be stayed, at the instance and request of the proctor of the said F. G. F. Harrison; and at his request also, the decree to see proceedings was neither served nor attempted to be served upon the said F. G. F. Harrison, personally, but that when the same was returned into Court, it was returned in the presence of his proctor, who then and there admitted that his client had acknowledged to him the receipt of a copy of the said decree.

Wherefore, &c.

Addams, in support of the protest. A party in contempt can do no act: this is the known and established law of the Court.

“ *Quia non auditur verus contumax.*”

Maranta, De Contumacia, part 6, sec. 19.

Many other authorities might be cited to the same effect, if it were necessary.

I can find no case where a party has appealed who was in contempt.

Contumacy is of two kinds, actual and presumed. The one where the party before the Court refuses some order, the other, where the party refuses or declines to appear.

In this case the party is in actual contempt,—is *verus contumax*.

The case of *Herbert v. Herbert* (a) is stronger than the present. There, the party who was in contempt merely for non-appearance, attempted to

(a) 2 Phill. 430; 2 Cons. Rep. 263.

appeal from an order of the Judge of the Consistory Court. Yet, in the Arches, an inhibition was refused. It is said, that, the contumacy of the party having been signified, and a writ *de contumace capiendo* issued, it was not competent to the Court below to take any further step; but the *significavit* was waived, and proceedings upon the writ *de contumace capiendo* were stayed.

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Curteis, on the same side. The inhibition is in the usual form, and the appeal purports to be from the sentence of the Judge pronouncing the marriage void; but, upon looking at the act on petition, it would seem that the appeal is really intended to be, from the Judge having proceeded in the cause after the 7th of May, 1841, the third session of Easter Term, when he decreed the contempt of the party to be signified; but there was no appeal from that act, and the sentence was not pronounced until the 22nd of July: if the party had appealed from the contumacy, it ought to have been set forth in the inhibition, as was done when the party, according to the ancient practice, had been excommunicated, *Oughton*, tit. 303. The party, however, remains in contempt, and the sentence is pronounced in pain of his contumacy,—which is tantamount to suffering judgment at law to go by default, and which is stated by Mr. Justice *Blackstone* to be a confession of the law and facts. Book 3, p. 396, he says, speaking of judgments, “Thirdly, where both the fact, and the law arising thereon are admitted by the defendant; which is the case of judgment by *confession* or *default*.” To such a party, therefore, it is not competent to appeal,—he

1842. is *versus contumax*, and can do no act. If such a
 HILARY TERM, course be warranted by the practice of the Court,
 Jan. 11th. the counsel for Mr. Harrison may produce cases
 HARRISON where a similar proceeding has been allowed; it is
 against incumbent upon them to produce such authorities;
 SPARROW. but they cannot do so.

It is contended, that, because the Judge in the Court below signified the contempt of the party, that therefore all further proceedings are void; this cannot be so,—the cases of *Rea v. Rea* and *Fitzgerald v. Fitzgerald* are direct authorities to the contrary.

In *Rea v. Rea*, (Consistory,) which is not reported, the following minutes appear:—

1800. “The Judge, at petition of Bicknell, concluded
 EASTER TERM, the principal cause, and assigned the same for sen-
 May 3rd, tence and information the next Court. Bicknell
 1st Session. returned excommunication duly published, alleged the party to have been excommunicated forty days, the Judge decreed him to be signified to his Majesty, the rest of the assignation continued to next Court. On the following Court day,

“The Judge pronounced for the divorce.”
 —Although the party’s excommunication had been signified.

In *Fitzgerald v. Fitzgerald*, (a) the husband had been excommunicated for not paying costs. Upon his affidavit, stating his inability to pay more than a certain sum, Sir *George Lee* suspended the excommunication, and allowed him to bring in an allegation.

Sir *George Lee* says, “that as his contempts did

(a) 2 *Lec’s Cases*, 263, 264.

appear from his affidavit to arise from inability to pay the money, the effect of those decrees against him ought to be suspended till he was able to obey them ; and as he was ready with an allegation, which his counsel had signed, it would be unjust to hear this cause *ex parte*, and deprive him of a possibility of making his defence ;" clearly, therefore, shewing, that if the party had remained obstinately in contempt, the Judge would not have allowed him to be heard.

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The *Queen's Advocate*, *contra*. Contumacy is substituted for excommunication ; that was the major excommunicatio, *Ought*. tit. 11.

By stat. 53 Geo. 3, c. 127, all disability is removed except imprisonment under the writ *de contumace capiendo* ; here that writ has issued against the party in contempt, therefore no disability can now attach to him, and he has a right to appeal.

Even in *majori excommunicatione*, according to the old practice, an appeal was allowed.

There is no decided case in these Courts in which it has been held that a party in contempt cannot do any act ; but in the Court of Chancery the practice is not so, *Wilson v. Bates*. (a)

But it was said that the contempt was waived ; if so, the appeal is regular.

Harding, on the same side.

Contempt does not bar an appeal. The process now in use is substituted in the place of excommu-

(a) 3 M. & Cr. 197.

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nication, and it was competent to a person excommunicated to appeal.

Judgment by default, at law, is not analogous.—The practice of the Court of Chancery is more consistent with that of this Court,—and there a party in contempt may appear and do an act: in *Wilson v. Bates*, the plaintiff was in custody for contempt, yet he compelled the defendant to give in his answer.—But has not the party here waived the contempt?

Another question arises, whether all the proceedings, after the *significavit* issued, are not null and void?

COURT.

They were grievances from which you have not appealed.

Harding. Then *Herbert v. Herbert* is not in point, for in the judgment in that case, Sir John *Nicholl* says, he shall not decide whether a party in contempt can appear before purging his contempt; and, in *Fitzgerald v. Fitzgerald*, the party purged his contempt.

We do not deny that, when parties are in contempt, the Court allows the cause to proceed *in pœnam*; but it is another question, if, not content with that, the party allows the contempt to be signified, and the writ *de contumace capiendo* issues.

JUDGMENT.

SIR HERBERT JENNER FUST. (a)

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Jan. 29th.

HARRISON
against
SPARROW.

THIS is an appeal from the Consistory Court of London; in that Court a suit of nullity of marriage, by reason of impotence, was brought by the alleged wife against the husband, the Judge of that Court was of opinion that the wife had sufficiently proved the libel, and he pronounced the marriage null and void; from that sentence an appeal was asserted, and the usual inhibition issued, which was served, and an appearance has been given to it, under protest, and an act on petition has been entered into. This is not a very convenient mode of bringing the case before the Court, but there are precedents for such a course, although not agreeing precisely with the present case: the difficulty the Court has is to ascertain the state of facts as they existed in the Court below:—there is no process before the Court, and I can only see what is stated in the act on petition.

The cases in which a somewhat similar course has been adopted are those of *Herbert v. Herbert*; (b) *Clächester v. Donegal*, (c) and *Greg v. Greg*, (d) these cases are not precisely the same as the present, but sufficiently analogous to shew that this is not an improper proceeding.

In *Herbert v. Herbert*, an objection was taken to the issuing of the inhibition, a caveat was entered

(a) On the 14th of January, Sir Herbert Jenner, by license and authority of her Majesty, assumed the name of Fust, in addition to, and after that of, Jenner, in compliance with a proviso contained in the will of his kinsman, Sir John Fust.—*London Gazette*, Jan. 18th 1842.

(b) 2 Phil. 430; 2 Com. Rep. 263.

(c) 1 Add. 5.

(d) 2 Add. 176.

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Jan. 29th.

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against
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against the inhibition: it was contended that the inhibition ought not to issue, that there was no ground alleged for the inhibition, that there was no appealable grievance; and the Court being of opinion that there was not an appealable grievance, the inhibition did not issue.

In *Chichester v. Donegal*, the objection was taken after the inhibition had issued; in that case, an appearance had been given in the Consistory Court under protest, to a decree to see proceedings, the Court overruled the protest and pronounced for its jurisdiction; from that order the party appealed to this Court, an inhibition was extracted and returned, and the libel of appeal was brought in, which was opposed, on the ground that it did not on the face of it disclose an appealable grievance, but my learned predecessor was of opinion that the objection was taken too late, that it ought to have been taken by an appearance under protest to the inhibition. The appeal was afterwards proceeded with regularly, but the Court was finally of opinion that there was no appealable grievance.

- In *Greg v. Greg*, a suit for restitution of conjugal rights, one party appealed to the Court of Arches, and an appearance was given under protest to the inhibition, but the Court, on the ground that appealable matter appeared on the face of the inhibition, overruled the protest, and directed an absolute appearance to be given.

In *Ray v. Sherwood*, (a) an appearance was

(a) *Ray v. Sherwood* and *Ray*, was a suit of nullity of marriage by reason of incest, brought by Ray, the father, against Sherwood and Ray (the daughter). The libel in the Consistory having been rejected, Mr. Sherwood was served with two inhibitions in the

given to the inhibition under protest, and the Court held, that on the face of the inhibition there was no grievance from which the party could appeal, and relaxed the inhibition.

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These cases show that, where, on the face of the inhibition itself, it appears that there is not appealable matter, the objection should be taken in the first instance; the Court can then relax the inhibition: where there is no question of fact, but merely of law, this is a convenient practice; but where the question is one both of law and fact, the Court cannot dispose of it without having the process before it.

This is a question both of law and fact, and no objection arises upon the inhibition, for that states that the appeal is from a final interlocutory sentence; then, upon the face of the inhibition, there is no doubt that the party had a right to appeal; but it is said that the party was in contempt in the Court below, and that a party in contempt has no right to appeal.

The question, then, is, was the party in contempt? and, if so, had he a right to appeal or not?

I must, then, look at the proceedings in the

Arches Court, one at the instance of Ray the plaintiff, in the Court below, and the other of Ray the defendant; to these inhibitions Mr. Sterwood appeared under protest, and the protest with regard to the inhibition on behalf of the daughter was sustained, and the inhibition relaxed, on the ground that, being a defendant in the Court below, she had no grievance to complain of, and that on the face of the inhibition there appeared to be no appealable grievance: with regard to the inhibition on behalf of Ray the father, the protest was overruled, and an absolute appearance directed to be given. This point is not reported, although some reference is made to it in the Judgment.—Vol. i. p. 213.

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Court below : it appears, that a citation issued and was returned, an appearance given and a libel prayed, that the libel was admitted and an issue given ; that on the second session of Hilary Term a monition issued, calling upon Mr. Harrison to undergo an examination of his person ; that, no appearance being given to that monition, the party was pronounced in contempt ; it further appears, the party was not only pronounced in contempt, but his contempt was signified, and a writ *de contumace capiendo* issued, and was placed in the hands of the sheriff ; so that it was not only a process putting the husband in contempt for the purpose of proceeding with the cause, but in order to punish him by imprisonment. Nothing then occurred until the second session of Trinity Term ; on that day an order was made for the inspection of the lady's person, and a decree to see proceedings was taken out against Mr. Harrison ; that decree was not served on the party, but was returned on the third session of that Term, when the proctor of Mr. Harrison alleged that his party acknowledged to have received a copy of the said decree. The party then was before the Court by his proctor, his appearance is recorded, and no objection is made, nor anything urged in regard to the contempt ; it appears to me, that from this time the proceeding was not *in pœnam*, properly so called. I am of opinion, that what took place after the proctor for Mr. Harrison appeared and acknowledged the receipt of the decree to see proceedings, and his appearance being entered, was a waiver of the contempt of the party ; so that the proceedings from that time were with the party before the Court,

and the contempt being waived, the party is entitled to prosecute his appeal.

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It is, then, unnecessary to determine whether it is competent to a party in contempt to appeal or not, there is no decision to that extent ; in *Herbert v. Herbert*, Sir John Nicholl did not decide the point.

I am of opinion, that the party was not in contempt in the Court below when the sentence was pronounced, and that he is not precluded from prosecuting the appeal to this Court ; I therefore overrule the protest, and assign the party to appear absolutely.

This decision was affirmed on appeal by the Judicial Committee of the Privy Council, on the 22nd of June ; and the principal cause, being retained there in order to prevent delay, was assigned for sentence forthwith, upon the evidence taken in the Consistory Court, and on the 9th of July the sentence of that Court annulling the marriage was affirmed : an allegation tendered in the Privy Council on behalf of Mr. Harrison, and an offer to undergo an inspection of his person having been rejected, as coming too late.

The cause in the Consistory Court was heard *in camera*, but from its importance it is here inserted.

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SPARROW, falsely called HARRISON, *against*
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Sentence of nullity of marriage by reason of the impotency of the husband, pronounced, without the inspection of his person.

THE citation called upon Mr. Harrison to appear and “to answer to Jane Sparrow, spinster, falsely, as alleged, called Harrison, and pretended to be the wife of the said F. G. F. Harrison, in a certain cause of nullity of marriage, by reason of impotency of him the said F. G. F. Harrison.”

The libel which was admitted after opposition, pleaded :—

First, Second, and Third. The fact of marriage at the chapel of the British Ambassador at Paris, on the 28th of March, 1826, and the handwriting of the parties of their names to the entry of the marriage.

Fourth. That at the time of the aforesaid pretended marriage the said F. G. Harrison was a major, of the age of about forty years, but that the said Jane Sparrow, otherwise Harrison, was a minor only just turned of seventeen years of age.

Fifth. That the said pretended marriage was never consummated, as hereinafter more particularly pleaded ; but that the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, nevertheless, from and after the time thereof, lived and cohabited together, except as to sexual intercourse, as husband and wife, in manner as and at the several places also hereinafter more particularly pleaded : that they also, ever since their said marriage in fact, save as hereinafter mentioned, have acknowledged each other as and for husband and wife respectively, and that they were and are commonly accounted, reputed, and taken as and for such

respectively by and amongst their relations, friends and acquaintances.

Sixth. That on the night following the said pretended marriage, the said F. G. Harrison desired the said Jane Sparrow, otherwise Harrison, to sleep with her sister Augusta Sparrow, spinster, (who had accompanied them to France as aforesaid) as she had been thentofore accustomed to do; and which she did accordingly: that she also, still by the desire of the said F. G. Harrison, continued generally to sleep as before with her said sister during the rest of their stay in France, and until their return to this country, their journey to which, from Paris, commenced about a week after the said pretended marriage had been there celebrated, or rather profaned, as aforesaid: that at Abbeville, however, on their said journey, the said F. G. Harrison came one morning into the bed-room and bed of the said Jane Sparrow, otherwise Harrison, (her said sister having on that night occupied a separate bed-room and bed) and there lay with her for some time naked and alone, to wit, in the said bed.

Seventh. That on their return to this country, at or about the time in the next preceding article pleaded, the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, took up their residence at the Bath Hotel, in Arlington Street, London, where they continued to reside for about three months: that during such whole time (with the exception of certain nights, on which the said F. G. Harrison slept out of the said hotel, though, where in particular, on such nights, is unknown to the said Jane Sparrow, otherwise Harrison,) the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, slept every night naked and alone in one and the same bed-room, in which were two beds however, and which beds, for the most part, were occupied by the said F. G. Harrison, and the said Jane Sparrow, otherwise Harrison, separately: that the said parties, nevertheless, passed whole nights, or parts of whole nights, during such period, naked and alone in one and the same bed, to wit, that of the said Jane Sparrow, otherwise Harrison, who never refused or declined, but on the contrary, rather at all times invited the said F. G. Harrison's access to her bed, as well during the period articulate, as during the whole period of their cohabiting with each other, (howsoever) hereinafter pleaded.

Eighth. That in the Autumn of the said year, 1826, the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison,

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went on a visit to the grandmother, since deceased, of the said Jane Sparrow, otherwise Harrison, at Lakenham House, near Norwich, where they continued for about six weeks, during which whole time they occupied one and the same bed-room, and during about the first half of which they lay every night naked and alone in one and the same bed: that from Lakenham (after a short visit paid to an aunt of the said Jane Sparrow, otherwise Harrison, resident at Tostock in the county of Suffolk, and where the said Jane Sparrow, otherwise Harrison, by desire of the said F. G. Harrison, slept with her sister, the aforesaid Augusta Sparrow, who had accompanied them there,) the said parties returned to the Bath Hotel aforesaid, and at which hotel, as during their former stay thereat, they again occupied a double-bedded room: that from the said Bath Hotel the said F. G. Harrison and Jane Sparrow, otherwise Harrison, went to lodgings in South Audley Street, and from such to other lodgings in Dover Street, and from such last mentioned lodgings to the Waterloo Hotel, in Jermyn Street, London, respectively, where they continued to live and reside until the Summer of the year 1827: that in the Summer of 1827, the said parties again went abroad, *vis.*, *via* Dover and Calais, to Paris, where they resided for about three months. That after such time, to wit, in the Autumn of 1827, they made several tours together in France, still, however, from time to time, returning to and making Paris their principal place of residence until the Spring of 1828, when they went to Switzerland together. That during all such time the said F. G. Harrison absented himself from the bed, and mostly from the bed-room, of the said Jane Sparrow, otherwise Harrison, and constantly slept in a separate bed, and mostly in a separate bed-room, from that of the said Jane Sparrow, otherwise Harrison, during all such time.

Ninth. That the said parties, after staying for some time first in Switzerland as aforesaid, and afterwards at Boulogne and Calais respectively, returned together to this country, to wit, in or about the month of August, 1829, and again took up their residence at the Waterloo Hotel, in Jermyn Street, London, aforesaid: that from the said hotel, to wit, in or about the month of September, 1829, the said Jane Sparrow, otherwise Harrison, went on visits successively to her father, at Gosfield, in the county of Essex; to her aforesaid grandmother at Lakenham House, near Norwich aforesaid, and to J. H. Harrison, the father of the said F. G. Harrison, at Copford, also in Essex, and that

during her stay at such last-mentioned place, where, on her arrival, she was met by the said F. G. Harrison, and which lasted for about six weeks, the said F. G. Harrison slept every night naked and alone in one and the same bed with the said Jane Sparrow, otherwise Harrison. That the said F. G. Harrison, and the said Jane Sparrow, otherwise Harrison, returned together in the month of December in the said year, 1829, to the said Waterloo Hotel.

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Tenth. That the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, went together from the said Waterloo Hotel to lodgings in Dover Street, and afterwards, to wit, in or about the month of July, 1830, to other lodgings in Grosvenor Street, where they continued for about a year and a quarter : that during the whole of such their residence at the said Waterloo Hotel, and at each of their said lodgings successively, the said F. G. Harrison wholly absented himself from the bed of the said Jane Sparrow, otherwise Harrison, and that he, the said F. G. Harrison, slept but one night in the said house even in Grosvenor Street (and then only in consequence of having been detained there by the extreme severity of the weather) during the whole time aforesaid that they occupied lodgings therein, though where he slept, out of such house at such time, is unknown to the party proponent, and to his party, the said Jane Sparrow, otherwise Harrison : that the aforesaid Augusta Sparrow, spinster, was principally resident with the said Jane Sparrow, otherwise Harrison, during that period ; and that on the one night on which the said F. G. Harrison slept in the house during that period as aforesaid, he slept there in the bed usually occupied by the said Augusta Sparrow, spinster, who resigned it for his accommodation, and slept with her sister, the said Jane Sparrow, otherwise Harrison, on that night.

Eleventh. That in or about the month of November, 1831, the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, left Grosvenor Street aforesaid and went to Brighton, accompanied by the said Augusta Sparrow, where, at the end of about six weeks, the said Augusta Sparrow (who in the mean time had constantly slept with her said sister, the said Jane Sparrow, otherwise Harrison, the said F. G. Harrison occupying a separate bed-room,) caught the small-pox, of which disease she the said Augusta Sparrow soon after died there. That the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, returned

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to London upon that event, and from such time lived together successively at the aforesaid Waterloo Hotel, London, at Hampstead in the county of Middlesex, and at lodgings in Baker Street, London, and then again at the said Waterloo Hotel, until the month of February, 1833; but that during no part of such time did or would the said F. G. Harrison lie in the same bed, or save only occasionally, such occasions being rare, occupy the same bed-room with the said Jane Sparrow, otherwise Harrison.

Twelfth. That in the month of February, 1833, the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, went to Cheltenham together, and took up their residence there at the Plough Hotel, where, however, they had still separate bed-rooms, though the said F. G. Harrison used to visit the said Jane Sparrow, otherwise Harrison, in her said separate bed-room every morning, and from his regular habit of so doing, passed at the said hotel, or was taken for, her medical attendant: That from the said hotel the said parties went into lodgings, and afterwards, successively, into two cottages, all situate in or near the said town of Cheltenham, in all of which, however, as well as in the other places aforesaid, the said F. G. Harrison still absented himself from the bed of the said Jane Sparrow, otherwise Harrison; and that whilst resident at the last of such cottages, to wit, in or about the month of June, 1833, the said F. G. Harrison left altogether, and finally ceased to cohabit in any sort with the said Jane Sparrow, otherwise Harrison, who hath since that time seen him the said F. G. Harrison, but on two occasions only, and both times in the presence of a third person.

Thirteenth. That during all and singular the nights and parts of nights that the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, lay naked and alone in one and the same bed-room and bed, as pleaded in the *sixth, seventh, eighth, ninth, and eleventh* articles of this Libel, the said Jane Sparrow, otherwise Harrison, was apt and fit for coition, and was desirous of the conjugal embraces of him the said F. G. Harrison, and willing to be carnally known, in order to become a mother by him, and gave herself up to him without any reserve for that purpose accordingly: Also that during the whole thereof, save as hereinafter excepted, the said F. G. Harrison was of sound and perfect bodily health; but that, notwithstanding the premises, he, the said F. G. Harrison neither ever did nor was ever able to consummate his aforesaid pretended marriage with the said Jane Sparrow, other-

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wise Harrison, who is still a virgin, and has never been carnally known by man, as will appear on due inspection of her person (if necessary) to competent judges (physicians and surgeons or others).

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Fourteenth. That the said F. G. Harrison's parts of generation and sexual or seminal organs were and are not such, or in the same state, as are the same parts and organs in men capable of having connexion with and of the carnal knowledge of woman; and the party proponent expressly alleges and propounds, that it will appear to competent judges (physicians and surgeons or others) on a due examination of his the said F. G. Harrison's person, that such was and is the fact, and that he the said F. G. Harrison, as well at the time of his aforesaid pretended marriage with the said Jane Sparrow, otherwise Harrison, as before and ever since the same, hath been and now is naturally impotent or incapable of knowing any woman carnally; and that it will also further appear to such competent judges, on such due examination, that the said F. G. Harrison's natural impotency aforesaid was and is irremedial, and not be removed or relieved by art.

Fifteenth. That on the occasion of an interview, which the said F. G. Harrison had with the said Jane Sparrow, otherwise Harrison, at the aforesaid Waterloo Hotel, in the month of May last, to wit, of May in the present year, 1840, he the said F. G. Harrison admitted to the said Jane Sparrow, otherwise Harrison, (in the presence and hearing of a third person present during and throughout their said interview) that their said pretended marriage was a nullity, and that he knew it to be in her power to procure a legal sentence declaring it so to be, as he had taken several opinions on the subject, which went to that effect: That it was a delicate business (he added) for her to move in, but that she, as the injured party, must be the plaintiff, in any suit, to obtain such a sentence; and, that knowing, as he did, the sufferer which she had been, in consequence of their said marriage, he could not blame her for being the plaintiff in any suit which afforded her the means of releasing herself from it; or he, the said F. G. Harrison, on the said occasion, expressed himself to the very effect, in words of the identical meaning and import articulate.

Sixteenth. That the said Jane Sparrow, otherwise Harrison until recently, concealed from her legal and other advisers well the fact of the non-consummation of her aforesaid pretended marriage with the said F. G. Harrison, as the cause thereof,

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the other, or most of the other facts and circumstances connected therewith, and inferring or tending to evidence the same, hereinbefore pleaded, and that her motive to such concealment was female delicacy, coupled with her ignorance, until recently, of there being facts which upon proof, would entitle her to a sentence pronouncing and declaring her said pretended marriage with the said F. G. Harrison null and void in law: That on such better information, recently obtained as aforesaid, she, the said Jane Sparrow, otherwise Harrison, disclosed the said facts to her said legal and other advisers, and that the result of such disclosure has been the institution of this suit on her behalf.

In proof of this libel, the answers of Mr. *Harrison* were taken, and two witnesses were examined, T. W. Cooper, Esq. to prove the first article, he having been present at the marriage; and Marianne Dolphin, who was examined on the *first, second, third, fourth, fifth, and fifteenth*, articles.

The answers of Mr. *Harrison*, were to the following effect :

The *first, second* and *third* articles were in substance admitted.

Fourth. To the fourth he answered: That at the time of the celebration of the marriage, he the respondent was a major of the age of thirty-three years, but not of the age of forty-six years as articulate, and that the said Jane Harrison, then Sparrow, was as articulate of the age of seventeen years.

Fifth. To the *fifth*, respondent says: He admits that the marriage was never consummated (as to sexual intercourse as hereinafter more particularly answered); but that he and his said wife, from and after the time thereof, lived and cohabited together (save and except as to sexual intercourse) as husband and wife, as also hereinafter more particularly answered; and save that the said Jane Harrison, in reference to the proceedings in this cause, and since the same began, hath, as he believes, denied the validity of the aforesaid marriage: The respondent further answers and

says, that he and the said Jane Harrison, at all times since the said marriage, have respectively acknowledged each other as and for husband and wife ; and that they were so commonly accounted reputed, and taken to be, by and amongst their relations, friends, and acquaintance.

The *sixth* and following articles to the *twelfth* inclusive, were in substance admitted, although not precisely as pleaded.

Thirteenth. Respondent admits : That during all and singular the nights and parts of nights that the respondent and the said Jane Harrison lay naked and alone in one and the same bed-room and bed, as pleaded in the *sixth, seventh, eighth, ninth, and eleventh* articles of the said libel, the said Jane Harrison was apt and fit for coition ; but he disbelieves and denies that she was desirous of the conjugal embraces of the respondent, and willing to be carnally known, in order to become a mother by him ; and he also denies that she gave herself up to him without any reserve for that purpose, for he says, that on the contrary, the manner of the said Jane Harrison, on each and every of the said occasions, was extremely repulsive and frigid. And he further answers and says he admits : That on the said nights and parts of nights, he was of sound and perfect bodily health, and that notwithstanding the same, he never did, but he denies that he was unable to consummate his aforesaid marriage with the said Jane Harrison : the respondent says he knows not, and cannot form a belief or disbelief, whether the said Jane Harrison is or is not still a virgin, and has or has not been carnally known by man ; and also that he is unable to answer what the appearances in that respect may indicate, upon due inspection of her person by competent judges, physicians and surgeons, or others.

Fourteenth. He expressly denies that his parts of generation, and sexual or seminal organs, were or are not such, or in the same state, as are the same parts and organs in men capable of having connection with, and the carnal knowledge of, women : and he expressly denies that it will appear to physicians and surgeons, or others, on a due examination of his, the respondent's person, or that such was or is the fact, or that he, as well at the time of his aforesaid marriage, or before, or ever since the same, hath been, or now is, naturally impotent or incapable of knowing any woman carnally, or that it will also appear to such competent judges, upon such examination, that he has a natural impotency irremediable, and not to be removed or relieved by ~~art~~.

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willingly give her perfect freedom from it if he could. He afterwards added, "There is a way, Jane, by which you may obtain freedom;" then she said, "You mean the marriage never having been consummated:" he replied, "You are right, it never has." He said that he had considered the subject much, and had taken several opinions (of what kind I do not know). "In our case," he said, "medical opinions are necessary;" and he added, that it was a delicate matter, and she had better consult her own friend who was her legal adviser; that the highest legal authority, that of an Ecclesiastical Court, I remember, he said was requisite; that it was a very delicate matter for her to enter upon, and she had better put her case into the hands of her friend, her legal adviser. The interview lasted for an hour, or nearly as much, as I recollect. In what he said, respecting another person's child being the same to him as his own, I did not understand him to mean anything more than the adoption, on her part, of a child for her own happiness.

Report of Sir CHARLES MANSFIELD CLARKE, Bart., CHARLES LOCOCK, Esquire, and Sir BENJAMIN COLLINS BRODIE, Bart., the Physicians and Surgeons appointed to inspect the person of Mrs. HARRISON.

"The signs of virginity are in many instances inconclusive. In the present case there are no positive proofs of connection having ever taken place, or the contrary; but there are decidedly no physical impediments to sexual intercourse.

"CHARLES M. CLARKE, M.D.

"CHARLES LOCOCK, M.D.

"BENJAMIN C. BRODIE.

"London, 23rd June, 1841."

Upon this evidence the cause came on for hearing.

Addams and *Curteis*, for the alleged wife,—submitted that there was sufficient proof, of the non-consummation of the marriage, and of the inability of Mr. Harrison, and referred to the cases of *Mor*

ris v. Morris, (a) Greenstreet v. Cumyns, (b) Pollard v. Wybourne. (c)

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No counsel or proctor appeared for Mr. Harrison.

JUDGMENT.

DR. LUSHINGTON.

In cases of this description, the Court has generally considerable difficulty, and I have felt that this case is not without some embarrassment.

The certificate does not much assist the case; it affords no proof whether there has been connexion or not; but it is not wholly unimportant, it states that there is no impediment on the part of the lady; but the true question is, whether there has been a triennial cohabitation and no sexual intercourse?—I think there has been sufficient cohabitation to satisfy the expression triennial cohabitation within the meaning of the law.

If that be so, the question is, am I or am I not to believe the answers of Mr. Harrison? I see no reason whatever for disbelieving his answers, and they are supported by the evidence of Mrs. Dolphin.

I have examined the case very carefully, and am satisfied that there is no collusion; and if there be no collusion, taking the evidence to be true, I think I am justified upon the whole, in pronouncing the libel proved, and in declaring the marriage null and void.

The Court pronounced the marriage null and void, and condemned Mr. Harrison in the costs.

(a) Not reported.

(c) 1 Hagg. E. R. 725.

(b) 2 Cons. R. 332; S. C. 2 Phill. 10.

PREROGATIVE COURT OF CANTERBURY.

*In the Goods of the REV. WILLIAM SOUTHMEAD,
deceased.*

1842.

Jan. 15th.

Administration with will annexed *de bonis non* granted to the executors of a sister, the administratrix, deceased, for the use and benefit of the surviving sister, the sole next of kin, during her imbecility, without citing her next of kin.

Motion.

William Southmead died on the 25th of December, 1832, a bachelor, without a parent, leaving a brother, since deceased, and two sisters, Judith and Charlotte Southmead, his only next of kin. He left a will dated 24th of July, 1792, by which he gave the residue of his property to his mother, and appointed her sole executrix; she died in the lifetime of the testator. In February, 1833, administration with the will annexed was granted to Judith Southmead, who died in August, 1841, leaving part of the goods of the deceased unadministered; she left a will, and appointed executors. Charlotte Southmead, the surviving sister, and the only next of kin of the deceased, labouring under imbecility of mind, and being wholly incapable to take the administration or to renounce,

Addams prayed administration with the will annexed of the unadministered effects of William Southmead, deceased, to be granted to the executors of Judith Southmead for the use and benefit

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ended on the first sheet of the paper, where there was not room for the testator's signature and that of the witnesses, and the testator, instead of signing his name at the top of the next page, wrote it at the end of the printed form, where the testator's signature was directed to be made by the instructions in the margin of the paper.

Addams submitted that this might be considered a signing at the foot or end of the will, and prayed probate.

SIR HERBERT JENNER FOST.

The deceased seems to have written this will upon a printed form with great care; the will is divided into paragraphs, and the deceased looking, it should seem, to the instructions in the margin signed his name to the last paragraph of the printed form, supposing that to be the proper place; the more correct way would have been to put the signature where the will itself ends; but I am inclined to think that this may be considered a signing at the foot or end of the will, under the statute.

Probate to pass.

ARCHES COURT OF CANTERBURY.

1842.

Jan. 29th.

Church Discipline Act.

The bishop of the diocese having given notice of his intention of issuing a commission for the purpose of making inquiry as to the grounds of certain charges against a clerk in orders, under the 3rd sec. of 3 & 4 Vict. c. 86; without withdrawing such notice, issued letters of request to the Arches Court of Canterbury. *Held*, that the letters of request were sent to the Arches in the first instance, as required by the 13th section of the statute.

The Office of the Judge promoted by
SANDERS *against* HEAD.

This was a cause of office, promoted under the statute 3 & 4 Vict. c. 86, in virtue of letters of request under the hand and seal of the Bishop of Exeter, by Ralph Sanders, of the city of Exeter, against the Rev. Henry Erskine Head, rector of Feniton, in the county of Devon. The Judge having accepted letters of request from the Bishop of Exeter, a citation or decree issued, calling upon Mr. Head to appear in this Court; to this citation or decree, an appearance was given on behalf of Mr. Head, under protest. The decree, in which are embodied the letters of request, was as follows:—

HERBERT JENNER, knight, doctor of laws, official principal of the Arches Court of Canterbury, lawfully constituted; to all and singular clerks and literate persons whomsoever and wheresoever, in and throughout the whole province of Canterbury, into whose hands these presents shall come, greeting. Whereas we have lately received letters of request from the right reverend father in God, Henry, by divine permission Bishop of Exeter, of the tenor following, to wit:—

“ Henry, by divine permission, Bishop of Exeter, to the Right Honourable Sir Herbert Jenner, knight, doctor of laws, official principal of the Arches Court of Canterbury, lawfully constituted, your surrogate, or some other competent judge in this behalf.

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wherein are also openly affirmed and maintained other positions in derogation and depraving of the said Book of Common Prayer, contrary to the statutes and to the constitutions and canons ecclesiastical of the realm, and against the peace and unity of the church. Now, therefore, we the said Bishop of Exeter do hereby request you the said Right Honourable Sir Herbert Jenner knight, doctor of laws, official principal of the Arches Court of Canterbury, lawfully constituted, your surrogate, or some other competent judge in this behalf, to issue a citation or decree under seal of the said Court, calling upon the said Henry Erskine Head, clerk, to appear at a certain time and place, therein to be specified, then and there to answer to certain articles, heads, positions, or interrogatories touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially for having written and published, or caused to be published, the letter aforesaid, in manner aforesaid, to be administered to him at the voluntary promotion of Ralph Sanders, of the city of Exeter, gentleman, and to hear and determine the said cause according to the law and practice of the said Court. In witness whereof we have hereunto set our hand and seal this ninth day of November, in the year of our Lord one thousand eight hundred and forty-one, and in the eleventh year of our consecration.

"H. EXETER." L. S.

"Signed, sealed, and delivered in the presence of
EDWD. TOLLER, Jun.

And whereas, at the petition of the proctor of the said Ralph Sanders, and in aid of justice, we have accepted of the said letter of request, and decreed to proceed according to the tenor thereof, and in pursuance thereof have decreed the said Reverend Henry Erskine Head, clerk, rector of the rectory and parish church of Feniton, in the county of Devon, diocese of Exeter, and province of Canterbury, to be cited and called into judgment, on the day, at the time and place and to the effect and in manner and form hereunder written (justice so requiring), we do therefore hereby authorize and empower, and strictly enjoin and command you, jointly and severally peremptorily to cite or cause to be cited the said Reverend Henry Erskine Head, clerk, to appear personally or by his proctor duly constituted before us, our surrogate, or some other competent judge in this behalf, in the Common Hall of Doctors' Commons, situate in the parish of St. Benedict, near

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—
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HEAD.

**That on the day of October, 1841, the
defendant was duly served with a certain notice in**

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and evil report against you the said Reverend Henry Erskine Head, as the author and publisher of the said letter; and whereas we, Henry, by Divine permission, Bishop of Exeter, rightly and duly proceeding under the authority, and in conformity with the provisions of a certain act of Parliament, to wit, the 3 & 4 Victoria, chapter 86, intituled 'An Act for better enforcing Church Discipline,' of our own mere motion think fit and intend to issue a commission under our hand and seal to five persons, of whom one shall be our vicar-general, or an archdeacon or rural dean within our diocese, for the purpose of making inquiry as to the grounds of such report, in order to the institution, if need be, of such further proceedings in pursuance of the said last-mentioned act of Parliament, as the case may require; we do therefore, by these presents, under our hand, give notice of such our intention to you the said Reverend Henry Erskine Head, and we do hereby intimate to you that such our commission as aforesaid, for the purpose aforesaid, will issue accordingly at or after the expiration of fourteen days from the day of your being served with these presents. Given under our hand this eleventh day of October, in the year of our Lord one thousand eight hundred and forty-one.

HENRY EXETER."

That the said notice was and is a sufficient and subsisting notice, under the said third section of the said statute, of the intention of the said lord bishop, to do and proceed in all things as is therein set forth and expressed; and that it hath never been in any manner revoked or annulled.

1842. had jurisdiction in the matter stated in the said
 Jan. 29th. citation or decree with which the defendant had
 SANDERS been served, notwithstanding what was alleged on
 against his behalf, the relevancy of the whole of which was
 HEAD. denied.

The *Queen's Advocate* and *Harding*, in support of the protest.

If it can be shewn that these proceedings are not in accordance with the provisions of the statute 3 & 4 Vict. c. 86, this protest must be sustained.

The 23rd section of the statute provides, "that no criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland, for any offence against the laws ecclesiastical, shall be instituted in any Ecclesiastical Court, otherwise than is hereinbefore enacted or provided." And it was held unanimously by the Court of Queen's Bench, in the *Dean of York's* case, that no other proceedings can be taken.

The mode of proceeding against clerks is set forth in the third section, which enacts, "that in every case of any clerk in holy orders, who may be charged with any offence, &c., or concerning whom there may exist scandal or evil report, &c., it shall be lawful for the bishop of the diocese, within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission, under his hand and seal, to five persons, of whom one shall be his vicar-general, or an archdeacon, or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report; provided always,

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articles, but not afterwards, to send the case by letters of request to the Court of appeal of the province, to be there heard and determined according to the law and practice of such Court." Can this be said to be in the *first instance*, while proceedings may be now going on at Exeter? Besides, is this the same case? In this Court, it is the office of the Judge promoted by Sanders *against* Head, while at Exeter it is the bishop himself who is proceeding.

Addams and Robinson, contra.

JUDGMENT.

SIR HERBERT JENNER FUST.

This case comes here by letters of request from the bishop of the diocese of Exeter; the letters of request are set forth in the decree or citation issued in the cause, and the act of Parliament under which the suit is commenced is also stated. It is quite clear that these letters of request must differ from those which the Court has been in the habit of receiving from the chancellors of the different dioceses from whom letters of request used to issue to this Court. In those cases the bishop did not send the letters of request, but the Judge of the Court. There must be some form adapted to what is required by the act of Parliament.

A question has been raised as to the jurisdiction of the Court, and the points on which the jurisdiction is disputed, are set forth in the act on petition, and, as I collect them, are as follow:—

"That the cause is not sent in manner and form as by the statute is enacted or directed, according to the true intent and meaning of the statute."

That is the first ground taken for the objection. "And that it doth not appear, either in or by the citation or decree, or in or by the letters of request, on whose application or at whose mere motion this cause or case was in the first instance commenced, or at whose mere motion the party was charged with the pretended offence, nor at whose request or mere motion the said letters of request were granted." "Nor does it sufficiently appear that the several provisions, enactments, and directions of the act have been duly observed or complied with."

These are the grounds of objection to the form and manner in which the proceedings were commenced in this suit.

The first question is, what does the statute require with respect to letters of request, as to the form and manner in which they are to be sent: for the forms and requisitions of the act must be complied with; whether minutely, it is not necessary to inquire. Now there is no form or schedule to the act of letters of request; but it is argued that they ought to contain, not only the offence, but also all the particulars which are required in the notice from the bishop of the diocese in which the offence is alleged to have been committed, of his intention to issue a commission, pursuant to the third section of the act. I find no provision or enactment which requires that this must be stated in the letters of request; nothing in the act requires that the letters of request shall contain those particulars, which notice of intention to proceed in another form shall contain. Unless it is shown to me that great injustice would result to the party in sending letters of request in this form, I cannot un-

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complaint to the bishop is to be sent by letters of request to this Court. But it is said, that the notice sent by the bishop to Mr. Head of his intention to proceed under the provisions of the act of Parliament, by issuing a commission of inquiry, whether *prima facie* there was a ground for proceeding, is equivalent to a citation binding the bishop to carry it out to the fullest extent: and that he cannot now send the case here by letters of request; that, in point of fact, the notice, like the citation in *Ray v. Sherwood* (a), was the commencement of a suit. But the case of *Ray v. Sherwood* was a decision only with reference to a particular act of Parliament; that with reference to the term "*suit depending*" in that act, it was not necessary that there should be a *contestatio litis*, but a suit was considered to be depending by the issuing and service of a citation; that service, and not the return of the citation, was intended with reference to the words used in that act of Parliament. Whatever may be considered the commencement of a suit in this Court, whether there must be a *contestatio litis*, or whether a citation is sufficient;—is a notice equivalent to it? stating not that it was intended to proceed at once against the party, but to issue a commission for the purpose of making inquiry whether there was a just ground for proceeding; and giving the party notice provided by the act, in order that he might have an opportunity to defend himself when before the commissioners.

What is the effect of the 4th section? If it was this, that in point of fact there is to be a citation

(a) 1 Curt. 173—193.

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mission to issue, but the bishop may send the case up before or after the commissioners have inquired. But it is not necessary that I should say what would be my conclusion if the commission had actually issued. What I understand is, that the bishop, before the commission has issued, may send it up, and that that is sending it up to be heard in the first instance.

I consider the notice as a preliminary proceeding, in order to institute further proceedings before the commissioners, which further proceedings are themselves only preliminary proceedings. I think in this case, the notice is not to be considered as part of the proceedings, but merely as preliminary.

It is stated in the sixteenth section of the act. "Provided always, that the archbishop or bishop who shall have issued the commission hereinbefore mentioned in any such case, or who shall have heard any such case, or shall have sent any such case by letters of request to the Court of Appeal of the province, shall not sit as a member of the Judicial Committee on an appeal in that case." So that any bishop or member of the Privy Council who has issued a commission could not sit; but any bishop who has sent the *notice* might: there is nothing to prevent him from sitting.

I consider this as only a preliminary step to inform the party that proceedings may be issued against him, but as no part of the proceedings whatever. I think this same interpretation applies with reference to the other sections of the act of Parliament.

As to sending letters of request to this Court, it seems to me that it was intended that the judge

PREROGATIVE COURT OF CANTERBURY.

1842.

BUBBERS *against* HARBY and Others in the Goods
of GEORGE KATS, deceased.HILARY TERM.
Feb. 3rd.

Motion for
administration
with will an-
nexed to the
attorney of a
residuary lega-
tee, a married
woman, upon
her proxy
alone, her hus-
band refusing
to join, re-
jected.

The deceased died on the 11th of January, 1841, leaving a will dated the 9th of November, 1837. The will not having been proved, the executors were cited to accept or refuse probate, or to shew cause why administration with the will annexed should not be granted to Frances Bubbers (wife of W. Bubbers) one of the residuary legatees.

No appearance being given by the executors,

The *Queen's Advocate* prayed the administration to the attorney of Mrs. Bubbers upon her proxy alone, without her husband joining in the execution of it, he having declined to do so, fearing that he might be involved in proceedings in the Court of Chancery, and in expense. He submitted that a proxy from the husband was not necessary; in *Prankard v. Deacle* (a), it was held that a proxy was not necessary; in *Suter v. Christie* (b), Sir John Nicholl accepted a proxy without the husband, and in the goods of *Hardinge*, deceased (c), a married woman's proxy was received.

(a) 1 Hagg. E. R. 186. (b) 2 Add. 150. (c) 2 Curt. 640.

1842.

HILARY TERM.
Feb. 3rd.HORTON *against* WILMOT.

The Court having pronounced in favour of a will, and decreed administration, a party appealed; such appeal being abandoned, and the cause remitted, motion for costs out of the estate, at the instance of the representative of the appellant, rejected.

IN this case, a will of Sir Robert Wilmot, Bart., deceased, dated May, 1834, had been opposed by Sir Robert Wilmot Horton, as one of the executors of a former will, and the Court, in August, 1840, pronounced for the validity of the will, and decreed administration; from that decree Sir Robert Wilmot Horton appealed, he soon afterwards died, and ———, his representative, abandoned the appeal, and the cause was remitted to this Court in the usual way.

Burnaby now prayed the Court on behalf of ———, the representative of Sir R. Wilmot Horton, to decree the costs of the suit to be paid out of the estate of the testator; he submitted that the Court might make such an order, the cause having been remitted with all its emergencies.

SIR HERBERT JENNER FUST.

Is there any case where such a thing has been done?

Burnaby. Many cases might be found: if the Court feels any difficulty, it will perhaps allow the case to stand over.

The Court directed the case to stand over.

1842.

Feb. 26th.

HORTON
against
WILMOT.

serted and proceeded with to a certain extent, and the cause is now remitted to this Court in the same state in which it was when the decree was made, and no costs were given : no prayer was made for costs, under an impression that such an application would have perempted the appeal ; but that was clearly a misapprehension, the whole decree would have been one act ; and the Court itself might *ex mero motu* have directed the costs to be paid out of the estate.

The Court has now nothing to do but to carry into effect the former decree. I must reject this motion.

*In the Goods of SUSANNAH HARE, Spinster,
deceased.*

1842.

Feb. 19th.

An affidavit as to the due execution of a will being required from the attesting witnesses ; one of the witnesses deposing that the will was signed in the presence of himself and the other witness, the other witness having no recollection as to the fact,—probate allowed.

R. Phillimore prayed probate of the will of the deceased, under the circumstances stated by the Court.

SIR HERBERT JENNER FUST.

Susannah Hare, the deceased, in this case, died on the 26th of January last ; she left a will in her own handwriting, signed by her, and purporting to be attested by two witnesses ; there being no attestation clause, an affidavit was required from the witnesses as to the due execution of the will under the statute, and one of the witnesses deposed that he saw the deceased sign the will, in the presence of himself and the other witness ; the other witness

1842. the Court to accept the guardian elected by the
Feb. 19th. minor, and to decree administration with the will
annexed to her, without citing the husband of the
In the Goods of married woman, or the son who was probably dead.
WIDGER,
deceased.

SIR HERBERT JENNER FUST.

The executor is seventeen years of age ; the wife has the interest for life in 500*l.* stock, and unless there is a representation, she cannot obtain what was intended for her support. The nearest of kin to the executor are an elder brother, who has not been heard of since 1835, and two sisters, who have renounced the guardianship, but the husband of the married sister has not joined in the proxy, which is usually required ; but he is abroad, and his return is uncertain, and the Court is asked to dispense with the service of a citation in the usual way against him ; I am unwilling at any time to dispense with the forms commonly required by the Court, but here, the interests of the absent party will not be affected, and the administration is to be granted for the use and benefit of the minor. I think, under the peculiar circumstances of this case, the Court need not require the husband to be cited. The Court decrees administration to the widow, who has been elected by the executor as his guardian, for his use and benefit until he attains the age of twenty-one.

1842. leaving this country, the testatrix informed Mr. Stephenson, her confidential adviser, who wrote and attested the will, that she had deposited one part thereof in the strong room at Lambton Castle, with the said former will of the late Earl, and upon search after her funeral, a packet, tied up, and sealed with her seal, and endorsed with her initials, was there found by Mr. Stephenson, containing one part of the Countess's will and one part of the former will of the late Earl; the other part of the will was in the testatrix's own possession, at Genoa, and was brought to this country by Mr. Ponsonby, one of the executors.

Feb. 22nd.
In the Goods of
the Countess of
DURHAM,
deceased.

Addams prayed probate of the paper executed by the deceased, and of the will of the late Earl, of the 12th of April, 1826, as together containing her will.

The question is, whether the former will of Lord Durham forms part of the will of Lady Durham; nothing can be more express than the reference to that instrument; it is so precise as to exclude all possibility of mistake; before the Will Act, there can be no doubt that both papers would have been entitled to probate, and that act has made no difference. In *Habergham v. Vincent*, (a) it was held as to real property under the "Statute of Frauds," that if a testator in his will refers to another paper, and so describes it that there can be no doubt of its identity, that such paper is incorporated into the will, and forms part of it. In this case, there can be no doubt of the identity of the paper

(a) Ves. Jun. 209.

1842.

Feb. 22nd.

In the Goods of
the Countess of
DURHAM,
deceased.

If this be a good disposition of the real estate, I see no reason why it should not be a good disposition of the personal estate also.

Although I allow probate of these papers, similar cases must not pass without notice to the Court.

1842.

March 15th.

In the Goods of THOMAS DICKINS, deceased.

Reference being made in a will to a deed so as to make it part of the will of the testator; probate allowed of the will, and a notarial copy of the deed, under the circumstances.

THOMAS DICKINS died on the 13th of February last, leaving two sons and two daughters; he made a will on the 20th of August, 1840, and appointed his eldest son executor thereof. The testator left all his estates, real and personal, to his eldest son, upon trust for himself and the other children, in equal shares, the shares of the three younger children to be held by him, his heirs, executors and administrators, upon the same trusts, and for the same purposes, &c., as were mentioned in an indenture of settlement, dated the 20th of November, 1830, made between the testator and his said son, or upon so many of the said trusts, intents and purposes, as were then subsisting, or capable of taking effect. Upon an affidavit from the executor, that the deed referred to in the will was in his possession, and that it related, amongst other things, to freehold and copyhold estates, and that upon sale or mortgage thereof, it would be necessary for him to produce the deed, and, therefore, that it was not in his power to leave the same in the registry of the Court,

1842. Hogg, a son of the deceased, and one of the executors and the residuary legatee, proved the will in March 15th. the Archdeaconry of Bucks, (the personal estate of the deceased being sworn under 5,000*l.*) the testator being entitled to the sum of 850*l.*, secured upon mortgage of property in the Archdeaconry of St. Albans, and diocese of London. On the 15th of January, 1828, William Hogg, the executor, died intestate, and the surviving executor died without proving the will. The money secured by the mortgage was paid in 1822, and the mortgage assigned to the parties entitled to the freehold. The whole of the property of the testator had been administered under the probate from the Archdeaconry of Bucks, and the accounts had been settled many years ; in order to make a valid assignment of the said mortgage, it was now required that the will should be proved in this Court, for which purpose, the will had been transmitted from the registry of the Archdeaconry of Bucks.

In the Goods of
WILLIAM
Hogg,
deceased.

Addams prayed administration of the unadministered effects of the deceased to the representative of William Hogg, the son, who was the residuary legatee in the will, and that the administration might pass under 100*l.*

SIR HERBERT JENNER FUST.

The testator died in 1801, he made a will in 1799, and appointed two executors, one of them a son of the deceased, and the residuary legatee, proved the will in the Archdeaconry of Bucks ; it appears that the testator was beneficially entitled to a mortgage in the Archdeaconry of St.

1842. Edwards, and James Edwards, and to each and
 Feb. 24th. every of them, the sum of 50*l.*, free of legacy duty.
 FINCHAM I give unto my kind and faithful servant, Sarah
 against Ball, the sum of 19*l.* 19*s.* Also I give to her
 EDWARDS. daughter, Ann Ball, the sum of 19*l.* 19*s.* Also I
 give unto Mary Poole, my servant, if she shall be
 living with me at my decease, the sum of 5*l.* Also
 I give unto Rebecca Arnold, now living with me,
 10*l.* Also I give, as a testimony of regard, unto
 my friend, George Fincham, (of, &c.,) the sum of
 20*l.*, and I hereby nominate and appoint the said
 G. Fincham whole and sole executor of this my
 will. All the rest, residue, and remainder of my
 estate and effects, whatsoever and wheresoever, I
 give and bequeath unto my dear friend, Mrs. L. E.
 Lane, now staying at my house; the same to be for
 her sole use and benefit, independent of her present
 or any future husband, and for which her receipt
 alone shall be a sufficient discharge. And I do
 hereby revoke all former wills by me heretofore
 made, and declare this alone to be my last will and
 testament. In witness whereof I have hereunto set
 my hand, this 5th day of February, 1841.

“ M. YEOMANS.

“ Signed and declared by the said Martha Yeomans, the testatrix, as and for her last will and testament, in the joint presence of us, who in her presence, at her request, and in the presence of each other, have hereunto subscribed our names as witnesses.

“ HYLTON D. HACON.

“ JAMES BENNET ASHBY.”

The following other testamentary papers were brought into the registry: a paper dated July 18th,

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FINCHAM
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EDWARDS.

contain any legacy to Mrs. Arnold, and named Mr. Fincham as the sole executor. This will had been altered so as to form the instructions for the will of 1839.

The will propounded in the cause had been prepared, by Mr. Blake, from a copy of the will of the 27th of October, 1840, the alterations having been made in pencil, these instructions were not produced.

Mr. *H. D. Hacon* deposed, on the condidit, [after stating that he had been requested, by message, to call on the deceased to see her execute her will :]—" I continued to chat with the deceased until Mr. Ashby came in ; as soon as he came in, the will in question was produced, if it was not already lying on the table, but of which I cannot be certain ; the deceased signed her name to it in my presence, and in the presence of Mr. Ashby, saying to us, ' This is my will, and I beg you to witness it,' or she used words to that very effect. I treated the business as a matter of course, and only noticed that the deceased did execute her will by signing it in my presence, and of Mr. Ashby : I did not notice, (at least I do not recollect,) by whom the will was produced, nor any more of the circumstances attending the execution of the same, beyond the fact of the deceased declaring that the paper which she signed was her will. I did not hear the will read over to the deceased ; I did not observe that she read it to herself. She did not declare that she understood the contents of the will ; but, as I have before stated, she did declare that the paper which she signed was her will."

On cross-examination,

“ The deceased’s sight had always been feeble, and it gradually grew worse and worse ; I doubt whether the state of her sight at the time of the execution of her will would have enabled her to have read the same, at least, without difficulty.”

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J. B. Ashby deposed,—“ The deceased’s will was executed ; I cannot recollect what preliminary conversation, if any, in respect of such execution, took place previous to her signing it ; but I perfectly well recollect, that I and Mr. Hacon stood by the side of the table at which Miss Yeomans was sitting, and saw her sign it. The deceased was nearly blind, and it was necessary, lest she should sign in the wrong place, to fix her hand at the point where her signature was to be made ; and it was so done, I believe, by Mrs. Lane.” [After deposing to the fact of execution,] “ I know nothing of instructions given for the making of such will, nor whether the same was or was not read over to the deceased, nor whether she understood the contents of such will.”

On cross-examination,

“ The deceased was nearly blind, and I believe the pen she used in signing her name was handed to her, and placed on the spot where she was to sign, by Mrs. Lane ; and when that had been done, the deceased’s hand and the pen were quitted, and she was left to sign her name by herself, and did then subscribe the will unassisted, and of her own free will and accord.”

The will was opposed by Mr. G. Edwards, one of the nephews of the deceased, who gave in an allegation responsive to the *condidit*.

The *Third* Article pleaded,—Affection of the de-

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instructions. I did draw up and prepare a draft will, pursuant to such instructions, I sent it down ready for execution, under cover to Mrs. Lane, with instructions for the testatrix's due execution, I suggested getting a medical man to attest it."

Mrs. *Georgiana Egerton* examined on the responsive allegation, deposed on the *tenth* Article, to the following effect:—"Mrs. Lane was, as I consider, totally blind. She used certainly herself to say, that she could see a little, and talked of sending for her spectacles to see with; but I believe she could not see in the least degree, for I recollect, on one occasion, her not knowing that there were lighted candles in the room."

Elizabeth Bayley, on the same Article, deposed:—"Mrs. Lane had been totally blind for a length of time." On cross-examination—"She could I think see a light, but her sight was so imperfect that she could not see to read anything. She was always very near-sighted, and her sight grew worse and worse as she advanced in age; she became more and more so, till at last she became, as I considered, totally blind."

James de Fleury deposed:—"The deceased was all but blind before I last saw her; I do not think she was totally blind, but her sight was so bad, that she could not distinguish any one; indeed, she could not see my hand when held out towards her, but groped about for it, when she wanted to shake hands with me." On cross-examination—"I do not think the deceased was actually blind, but she was so much so, that she could not recognise any one."

At the hearing, the principal point relied on, in opposition to the will, was, that the deceased was blind, and that there was no proof that the will had been read over to her.

It has been considered advisable to report the case on this point only.

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Phillimore and *Addams* in support of the will.

The *Queen's Advocate* and *Jenner, contra*. The will of a blind testator must be read over to him in the presence of witnesses, and the identical will must be read; in *Williams on Executors*, page 16, 2nd edit.) the rule is thus stated, "He that is blind may make a nuncupative testament by declaring his will before a sufficient number of witnesses; but he cannot make his testament in writing, unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will; and therefore, if a writing were delivered to the testator, and he, not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that if he should hear the same, he would not own it. And it seems best that it be read over to the testator, and approved by him, in the presence of all the subscribing witnesses; and this the civil law did expressly require in the case of a blind man's will. But in England this strictness seems not to be precisely requisite, if there shall be otherwise satisfactory proof before the Court, *that the identical will was read over to him, although it was not in their presence*" (a).

(a) In the 3rd Edition, (1841), this passage in italics, is thus

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PER CURIAM.—Must the identical will be read over, may it not be shewn that the testator had knowledge of the contents?

Counsel. It is submitted that would not be sufficient. See *Barton v. Robins (a)*, *Longchamp v. Fish (b)*.

JUDGMENT.

SIR HERBERT JENNER FUST.

This will is made in favour of a person who is a stranger in blood to the deceased, to the exclusion of three nephews and a niece, for whom the testatrix appears to have felt some interest, though no very great regard, this is proved by former wills; under one they were to take legacies of one hundred pounds each; and from 1835 up to 1840, she did intend that they should each take legacies to that amount. The person to be ultimately benefitted is Mrs. Lane, the wife of a gentleman at present in India. It appears that Mrs. Lane had early in life been placed under the tuition and care of this lady, she remained with her many years, and then went to India, where she married; on her return to this country, she took up her abode in the neighbourhood where the deceased lived, and was frequently with her two children, resident in the house of the deceased, who appears to have entertained the greatest

amended. "If there shall be otherwise satisfactory proof before the Court of his knowledge of the contents of the identical will;" and (page 263). "Where the testator is blind, it must be proved that the contents of the will were known to the deceased; for his execution or other acknowledgment of the will is not sufficient."

(a) 3 Phill. 455, n.

(b) 2 New Rep. 415.

regard and affection for her ; as is testified by the disposition of her property by the will of 1839, the deceased names her residuary legatee, as she also does in the will now in question. The property is sworn under 1500*l.*, but there are certain legacies given,—I assume that Mrs. Lane will eventually receive about 1000*l.*

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 against
 EDWARDS.

It has been said, that this is a will of a person blind, or almost blind ; and that the will is not proved to have been read over to the deceased, and it has been argued, that proof of the mere fact of execution, without proof of knowledge of the contents, which is only to be inferred, as it is contended, by the identical will being read over to the deceased, is insufficient to establish a will in the case of a blind testator, or a person—like this lady—blind for all useful purposes. The result of the evidence on this part of the case, I take to be this, that although the deceased was capable of forming a correct opinion as to whether a candle was alight in a room, she was blind to this extent, that at the time when she signed this will, she was obliged to have her hand guided, and placed in a proper direction.

Certainly, when the Court is asked to grant probate of a will of a party totally, or almost blind, it must be shewn, to the satisfaction of the Court, that the contents of the will are conformable to the instructions and intentions of the deceased ; undoubtedly in this case, the will is not proved to have been read over to the deceased. A reference has been made to Mr. *Williams's Treatise* (a), but

1842. the case of *Barton v. Robins* (a) shews, that it is
Feb. 24th. not necessary that the actual will should be read
over, if there is proof that the party deceased knew
the contents of it. That was a strong case, the will
gave the property to the drawer of it, an attorney,
there was proof that part had been read over to the
deceased, but no proof as to the other part. Sir
G. Hay said, "My opinion is, the part not read
over is void;" so far he confirms the proposition
now contended for; but he goes on—"A blind
man's will established upon proof that he knew the
contents of the will, though not read over before
the witnesses"—and at the conclusion, he says, "In
point of law the writer who is benefitted, must shew
that the contents were known." The result was
this, Sir *G. Hay* pronounced for the part of the
will which had been read over, and directed the
residue to be expunged.

I am of opinion, that the deceased in this case,
sufficiently knew the contents of this will, and I
pronounce for it, but without costs.

Affirmed by the Judicial Committee of the Privy
Council.

(a) 3 Phill. 455, n.

*In the Goods of WILLIAM HAYNES, deceased.**Motion.*

1842.

March 15th.

THE testator died at Mirzapore in the East Indies, in December, 1834. He left a will, and appointed two executors in India, who proved the will there; he also appointed the Archbishop of Tuam for the time being, an executor in Ireland. In August, 1835, probate was granted by this Court, to the Archbishop of Tuam. The executors in India were directed by the will to transmit the deceased's property to the Archbishop, for him to dispose of amongst the testator's family, who lived in and near the city of Tuam, in such portions as should appear to the Archbishop to be fair and just, and they were required to abide by his decision. The executors in India remitted the proceeds of the principal part of the property of the testator to the Archbishop, who distributed the same among the testator's relations, under the direction of the Court of Chancery in Ireland. The Archbishop died in March, 1839, and further sums having been since remitted, and more shortly expected, there are no persons authorized to give a proper discharge, or to carry the trusts of the will into effect. The stat. 3 & 4 Wm. 4, c. 37, enacts, "that when the archiepiscopal sees of Tuam and Cashel should become void, the Archbishops should cease to have archiepiscopal jurisdiction, which should be transferred

A testator appointed the Archbishop of Tuam for the time being, an executor of his will, the archiepiscopal jurisdiction of Tuam having been abolished by stat. 3 & 4 Wm. 4, c. 37, —probate granted to the Bishop of Tuam as executor.

1842. to the Archbishop of Armagh, to whose jurisdiction
 March 15th. the Bishop of Tuam should be subject. The bishop's
 In the Goods of residence is at Tuam.
 WILLIAM
 HAYNES,
 deceased.

Addams prayed probate to the Bishop of Tuam.

SIR HERBERT JENNER FUST.

The testator died in 1834 ; he appointed two executors in India, and the Archbishop of Tuam for the time, to whose discretion everything was entrusted as to the division of the property among the deceased's relations. Probate was granted to the archbishop in 1835, who proceeded to administer the effects of the deceased, under the directions of the Court of Chancery of Ireland. The Archbishop died in 1839, and it is requisite that administration should now be granted, and an application is made on behalf of the Bishop of Tuam. By the 3 & 4 Wm. 4, c. 37, the archiepiscopal jurisdiction of Tuam is removed to Armagh, and there is now no Archbishop of Tuam ; it is stated that the Bishop of Tuam's residence is at Tuam, and it may be presumed that the testator knew that the residence of his relations was in the diocese of Tuam, and the question is, whether administration is to be granted to the Bishop of Tuam ? No doubt it was the deceased's intention that the person likely to have a knowledge of the claims of his relations, should be his executor, and not the Archbishop of Armagh. I am clearly of opinion that the Bishop of Tuam is the person intended.

In the Goods of FRANCIS WILLESFORD, deceased.

Motion.

1842.

March 16th.

THE testator died in January last ; he left a will with a codicil thereto, of which he appointed his three sons executors. On the first side of the will, there was the following clause : “ I also give to my said three sons the several watches, jewels, silver, or such other articles as are enumerated in the paper hereunto annexed, allowing my wife the use of the several silver articles so given by me to my son Harry, during her life,” and towards the conclusion of the will, he directs the residue of his real and personal estate to be divided between his sons, share and share alike, “ but on the terms and conditions hereinbefore expressed, and that the paper hereunto annexed, as referred to by me, be deemed as a further distribution of my effects.” On the death of the deceased, the will and codicil were found in a sealed packet, and, attached to the will by a pin, was also found a paper purporting to dispose of plate, jewels, and other things, and which began : “ For the Rev. F. F. B. Willesford, in accordance with my will,” and ended “ reserving for my wife the use of such silver articles for her life, in accordance with my will,” and the third side of the paper was written : “ This is the paper referred to by my will as hereunto annexed. Francis Willesford, 15th June, 1841.”

Probate granted of an unexecuted paper as part of the will of the testator, there being sufficient reference to the paper in the will to identify it as the paper referred to.

1842. The papers were all in the handwriting of the
March 15th. deceased.
In the Goods of The two subscribed witnesses deposed that they
FRANCIS
WILLESFORD,
deceased.

did not recollect to have noticed the paper so as to identify it as being annexed to the will, but that they believed that it was annexed at the time of the execution of the will.

The *Queen's Advocate* moved for probate of the paper as part of the will and codicil.

SIR HERBERT JENNER FUST.

The question is, whether this paper is sufficiently identified, as to enable the Court to grant probate of it as part of the will? It is found pinned to the will, and it is expressly stated by the testator to be the paper referred to in the will. In the case of Lady *Durham's* (a) will, the Court held, as far it could decide on an *ex parte* motion, that a paper in existence before the date of the will, if referred to, and sufficiently identified as the paper intended by the testator, may form part of the will, although such paper is not attested. In this case the paper is sufficiently identified, and it was in existence when the will was executed; probate may therefore pass of the paper as part of the will and codicil of the deceased.

(a) *Ante*, p. 57.

*In the Goods of RICHARD SIMMONDS, deceased.**Motion.*

1842.

April 20th.

Haggard moved the Court to allow administration with the will annexed of Richard Simmonds, deceased, to pass, there being no executor named therein ; the circumstances were almost identical with those of Ann Allen deceased (a).

The deceased having signed his will, acknowledged the signature in the presence of one witness, who subscribed his name to the will, and on a subsequent day acknowledged the signature to another witness, who subscribed his name, the former witness being present at the time, but who did not again subscribe his name ; motion for probate rejected.

SIR HERBERT JENNER FUST.

The deceased in this case died on the 19th of March last, a widower, with seven children, after his death a will was found which bears date the 9th of January, 1842, there is no executor or residuary legatee named in it, it was signed by the deceased, no witness at that time being present, he afterwards acknowledged his signature to one witness who signed the will as attesting his acknowledgment, some time afterwards (on the 9th of February,) he shewed it to another person and acknowledged his signature, the former witness being also present at the time, so that the deceased acknowledged his signature to two witnesses present at the same time ; the second witness then attested it, but the first witness did not again attest it. According to the opinion I gave in the case of *Allen*, this is not a compliance with the statute ; it

(a) Vol. 2, p. 331.

1842. appears to me that the intention of the Legislature
 April 20th. was, that there shall be a signing or acknowledgment
 In the Goods of in the presence of two witnesses present at the same
 RICHARD time, and that they shall both then attest it.
 SIMMONDS,
 deceased. Motion rejected.

The Duke of DORSET *v.* LORD HAWARDEN.

1842. *On Petition.*
 April 20th.
 A testatrix appointed an executor by the description of "Lord Sackville," and "Lord George Sackville." It appeared that there were only two persons to whom the description could apply, viz., "Charles, Lord Sackville, Duke of Dorset," and the "Hon. George Germain." Held, under the circumstances that the former was the party intended.

In this case the Duke of Dorset claimed to take probate of the will of Charlotte Leighton, deceased, as being one of the two executors named therein.

The testatrix died in September, 1841, by her will, dated the 2nd of April, 1839, she "gave and bequeathed unto her cousins Lord Hawarden and Sackville, a thousand pounds a piece, provided they consented to take upon themselves the trust of executors to that her last will and testament."

"And she nominated, constituted, and appointed, the said Lord Hawarden and Lord George Sackville executors of that her will and testament."

The following are the facts material to be adverted to. In 1770, the Right Hon. Lord George Sackville, the father of the Duke of Dorset, assumed, by virtue of an act of Parliament, the name of Germain, and continued to be known as Lord George Germain until 1782, when, by letters patent, he was created Viscount Sackville and Baron Bolebrooke. In 1785 he died, leaving two sons, viz., the present Duke of Dorset, and the

1842.
 April 20th.
 The Duke of
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of him as Lord Sackville, and would more probably make a mistake between the Christian names "George" and "Charles" than between the surnames "Sackville" and "Germain," they cited *Beaumont v. Fell* (a); *Miller v. Travers* (b); *Still v. Hoste* (c); *Rivers' case* (d); *Gord v. Needs* (e); *Bradshaw v. Bradshaw* (f); *Wigram on Evidence* (g); *Phillipps on Evidence* (h).

Addams and *Curteis*, *contra*, submitted, that the description did not apply to the Duke, inasmuch as he never was Lord George Sackville, that by that description the testatrix could not have intended Charles, Duke of Dorset, who had been Duke of Dorset for twenty years before her death, that the probabilities of the case favoured the supposition that the testatrix, upon the accession of Charles, Lord Sackville to the dukedom of Dorset, imagined that the Hon. George Germain had become George Lord Sackville, or Lord George Sackville, their common friend Mrs. Corbett having stated, in an affidavit, her belief that such was the fact. That at all events the identity was not so clear as to allow the Court to pronounce that by the description "Lord George Sackville," the person meant, was Charles, Duke of Dorset. *Doe v. Hiscocks* (i); *Smith v. Galloway* (k); *Blundell v. Gladstone* (l).

(a) 2 P. Wms. 140.

(b) 8 Bingh. 244.

(c) 6 Madd. 192.

(d) 1 Atk. 410.

(e) 2 Mees. & Wels. 149.

(f) 2 Younge & C. 72.

(g) Prop. 7.

(h) Phillipps & Amos, pt. 2, c. 5, s. 1.

(i) 5 Mees. & Wels. 363.

(k) 5 B. & Ad. 43.

(l) 11 Sim. 467.

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known as Lord Viscount Sackville; he had borne the surname of Germain from 1770 until his father's death in 1785, but his Christian name is Charles. The deceased, in the latter part of her life, lived in great seclusion, and there seems to have been no intercourse between the Duke of Dorset, or Mr. George Germain and the deceased after 1800; it appears, therefore, *a priori*, unlikely that she should have appointed either of those persons executor of her will.

The question is, who is meant by Lord George Sackville? being evidently the same person named as Lord Sackville in the preceding part of the will. Now it is admitted, there are only two persons whom the deceased could have meant,—the Duke of Dorset, or his brother Mr. George Germain; the question is, to which of the two does the description most nearly apply? The first point is, whether parol evidence is admissible; and if so, secondly, whether the Duke of Dorset is the party meant? It would be useless to go through the authorities bearing on the first point; the general rule is this: "*ambiguitas verborum latens verificatione suppletur*;" here there is that latent ambiguity; on the face of the will there is no ambiguity,—there is a person referred to by name in the will, one of two persons must be the party meant. How far does the Duke of Dorset answer the description? He was known to the deceased as Lord Sackville; he answers the description so far, but his name is Charles, and in the clause appointing the executor, the party is named "George." I think it probable he was not addressed by his Christian name at the time of the intercourse between him and the deceased. The

CONSISTORY COURT OF LONDON.

DILLON *against* DILLON.

1842. THIS was a cause of divorce by reason of adultery,

April 22nd. promoted by the Rev. R. C. Dillon, D.D., against
Frances Charlotte Dillon, his wife.

The libel pleaded, in the *first*, *second* and *third* Articles, the marriage of the parties of the 26th of November, 1839, and their cohabitation together as husband and wife.

Fourth, That on Tuesday, the 29th day of December, 1840, the said F. C. Dillon went to Gravesend, that her ostensible purpose in so going was to pay a visit of several days to her mother, then resident at or near Gravesend, and for which she had solicited and obtained her husband's permission, who accompanied her to Blackwall on that day, where she embarked on board a steam-packet, as for the purpose of proceeding therein to her mother's house, at or near Gravesend.

Fifth, That at some time previous to the premises in the next preceding Article pleaded, but when, more particularly, is unknown to the party proponent, the said F. C. Dillon formed a lewd and adulterous intercourse with some man whose name is unknown to the party proponent. That on the arrival of the steam-packet at Gravesend, on the

1842. 30th of May, and the other the 4th of July, 1841,
 April 22nd. and great cordiality between them on both oc-
 casions.
 DILLON
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The admission of this allegation was opposed, by
Addams, for Dr. Dillon.

Nicholl argued in support of it.

[1841.
 July 22nd.]

JUDGMENT.

DR. LUSHINGTON.

On debating
 the admission
 of a defensive
 allegation in a
 suit for divorce
 by reason of
 adultery. *Held*,

That a charge
 of cruelty is
 not rendered
 admissible by
 an averment,
 that it was de-
 signedly com-
 mitted with the
 view of in-
 ducing the
 adultery, and,
 thereby ena-
 bling the hus-
 band to obtain
 a separation
 from his wife.

That decla-
 rations of the
 husband, ex-
 pressive of a
 desire to get
 rid of his wife,
 are admissible,
 as tending to
 elucidate his
 conduct in

The parties in this suit are the Rev. Dr. Dillon,
 and Charlotte Frances, his wife, and, according to
 the copy of the entry in the register annexed to the
 libel, they were married on the 26th of November,
 1839, Mrs. Dillon being at that time a minor and a
 spinster. It is not pleaded that there was any
 courtship between the parties previous to the mar-
 riage, and it may not be necessary to plead this,
 but when long established forms are departed from,
 the vigilance of the Court is usually excited. There
 is also an absence in the pleadings of circumstances
 leading up to adultery, or to the probability of
 adultery, one single act of adultery is alone
 charged; indeed, the circumstances connected with
 the case are all marked with considerable sin-
 gularity.

[The Court read the *seventh* and *eighth* Articles
 of the libel.]

reference to the facts of the case.

That it is competent to a party charged with adultery, first, to deny such charge specifically;
 secondly, to plead condonation.

A husband receiving information, impugning his wife's fidelity, sufficient to induce him to
 investigate her conduct, is bound, pending the inquiry, to abstain from cohabitation, although
 not bound to remove her from his house.

A departure from established forms of pleading, although in a particular not strictly essential
 to the proof in the cause, is calculated to excite the vigilance of the Court.

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identity ;—indeed the diversity was clearly established.

This disposes of the first *five* Articles of the allegation, I now come to the *sixth*, which pleads that on the 9th of May, 1841, after the circumstances stated in the *eighth* Article of the libel, were known to Dr. Dillon, and he had taken measures founded on them, he passed the night in the same bed with his wife. This, it is said, is pleading condonation, which proceeds on an avowal of adultery, and is inconsistent with a denial of adultery, but according to the rules of pleading in this class of cases, I apprehend you may plead double—you may first deny the adultery in toto, and you may further plead that if the adultery shall be proved to have been committed, it has been condoned.

I now come to the *eighth* Article, when I first read this Article of the allegation, I found that it contained matter of serious difficulty, I have searched for cases in order if possible to discover whether acts of cruelty, coupled with such declarations as are pleaded in this Article, had ever been admitted or rejected, and if the latter, what were the reasons why they had been rejected.

[The Court read the Article.]

The argument adduced in order to sustain the Article, is, that it may prove two things ; first, that Dr. Dillon places little reliance on the information he had received ; secondly, that he was ready to listen to any charges against his wife, with a disposition to give them credence.

Now, on referring to the cases, I find it laid down in several of them, that cruelty cannot be

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to do so, to depart from the doctrine as laid down by my predecessor ; with regard then to this case, all that I have to consider is, whether the doctrine just laid down is applicable to the circumstances of it, which are very peculiar.

Now the way to consider the question is, to try what will be the legal effect of the cruelty, if proved ; the Counsel for Mrs. Dillon has disclaimed any suggestion that it could bar the sentence for divorce, if the adultery shall be proved ; then the only effect of it will be to throw some degree of suspicion on the husband's case, as to whether he actually believed the charge made against his wife. If adultery is charged against a wife, if counter adultery cannot be proved, nothing can bar a sentence for separation but connivance on the part of the husband, cruelty will not be a bar neither will malicious desertion, although such conduct may have a tendency to cause the wife to commit adultery, it is clearly established that it is no defence to the husband's suit, although I have some doubt as to the propriety of the doctrine on this point, I have felt myself compelled to act on it, indeed, I did act on it in a recent case of *Morgan v. Morgan (a)*.

Is the doctrine thus established affected by pleading that the cruelty was committed with the ulterior design of getting rid of the wife by driving her to the commission of adultery, is it connivance ? I think it is not. There may by possibility be cases where cruelty on the part of the husband may directly lead up to the wife's adultery ; I say nothing upon such a case.

(a) 2 Curt. 686.

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A party marrying a young person whom he had previously seduced, is bound to exercise more than ordinary marital care over her conduct and deportment.

Where a single act of adultery is pleaded, unaccompanied with circumstances leading up to the probability of its commission, the Court will view the case with jealousy, and examine the evidence with great vigilance.

Evidence in proof and in disproof of adultery being equally balanced, the

Court examined the following incidents of the case.

First, The fact of the wife having, previous to the marriage, been seduced by the husband.

Second, The fact of warnings, direct and indirect, given to the husband, calculated to excite his vigilance for his wife's honour, and no steps taken by him in consequence thereof.—The absence of due precaution may amount to criminal negligence.

Third, The fact of cohabitation continued after *probabilis scientia* of the alleged adultery.

Fourth, The citation in the cause served on the wife, whilst in company with her husband.

Fifth, Two interviews, of some duration, between the husband and wife, after the commencement of the proceedings, their object and effect being unexplained. *Semble*, that, on the part of the wife, the fact of such interviews should, immediately on their occurrence, have been brought to the notice of the Court.

Sixth, The absence of an action at law, and of any attempt to discover the *particeps criminis*, and no evidence accounting for the omission,—although in cases of separation, by reason of adultery, proceedings at law are, generally speaking, unnecessary, they are of great importance when the proof in this Court depends on identity.

In weighing the testimony of witnesses, naturally biassed, the rule is, to give credit to their statements of facts, and to view their deductions from facts with suspicion.

Observations in testing evidence in a case of disputed identity.

JUDGMENT.

DR. LUSHINGTON.

This is a suit brought by the Rev. Dr. Dillon, against Frances Charlotte Dillon, his wife, for a separation by reason of her adultery, and certainly, since the time I have sat in this chair, I have never met with a case where the evidence required a more careful and painful investigation.

On the part of the wife the adultery is denied; and further, it has been argued on her behalf, that Dr. Dillon's conduct, as well on the discovery of the alleged adultery, as during the progress of the suit, has been such as to bar him of his remedy in this Court, even were the charge of adultery sufficiently established:—to these points my attention must be directed.

The parties were married at the latter end of November, 1839, and it has been truly observed by the counsel of Dr. Dillon, that the marriage did not take place under happy circumstances, since it has been proved by Mr. Wingate, a witness examined on behalf of Dr. Dillon himself, that Dr.

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I now proceed to the charge of adultery : it is contained in the *fourth* and *fifth* Articles of the libel, and it is necessary to advert to them with some particularity ; in substance they plead, First, “that on Tuesday the 29th of December, 1840, F. C. Dillon went to Gravesend, for the ostensible purpose of paying a visit to her mother, for which she had solicited and obtained her husband’s permission, who accompanied her as far as Blackwall. That at some time previous, F. C. Dillon had formed an adulterous intercourse with some person whose name is unknown. That on her arrival at Gravesend, the said F. C. Dillon was joined by this person, and proceeded in company with him, in an omnibus or other public conveyance, to an inn at Gadshill, called the ‘Sir John Falstaff,’” and it is then alleged that the parties spent the evening there together, and committed adultery ; that the next morning they left the inn for Gravesend, to which place, it is pleaded, the said F. C. Dillon stated that she was about to proceed to visit her mother.

Now the first observation that arises on this part of the case, is, the total absence of circumstances leading up to and making the adultery probable ; and the total silence as to why no such evidence is produced. It is true that in almost all cases, adultery is clandestine, but it is equally true, in the great majority of cases, where the parties are cohabiting together, that after the discovery of the fact of adultery, evidence is produced to shew that it is probable ; but in the present case, there is no evidence of any previous circumstances, and if any have since come to light, they are neither pleaded

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are stated, enabling them to fix the time : it certainly does appear to me, that the fact of a ball being to take place the next day at their house, reasonably tended to enable the witnesses to fix the time, and I do not think the accuracy of the maid servant is impugned by her saying, that it was two nights before Christmas day, instead of New Year's day ; it is a very natural mistake, and not such a discrepancy as would cause any doubt as to the accuracy with which the witness had fixed the day.

Then with regard to the identity of the person, and the power of witnesses to speak to the identity of an individual, I think these witnesses, having had such means and opportunity in this case of seeing the lady, and in all probability having had their attention particularly called to her, and especially so Mr. Wilson, who attended in person upon the parties at tea, and again in the morning at breakfast, would be enabled to speak to the identity of her person with reasonable certainty ; and I say reasonable certainty, because I think, that, as a general observation, an inn-keeper may not be the best witness to speak to the identity of a guest whom he sees but once ; an inn-keeper must be in the habit of seeing a great number of strangers, and unless there be some circumstances attracting his attention, he is not likely to take very accurate notice of his guests. But these observations do not apply on the present occasion, where it is stated by the witnesses, that there was the peculiar fact attracting their notice, namely, that the lady had lost an eye, or, at least, that one eye was visibly affected, and also the fact of the

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unless there be other circumstances to be taken into consideration. However, before the Court can arrive at the conclusion that these facts are proved, and before it can pronounce Dr. Dillon entitled to the divorce he seeks, not only must the evidence to establish the *alibi* be carefully weighed, but many other important circumstances must be investigated and considered.

Now the evidence to establish the *alibi* consists of the testimony of four persons, Mrs. Drury, the mother of Mrs. Dillon, Janet Rumball, her daughter, Emily Dicks, and Elizabeth Lloyd. They have been examined to prove, that Mrs. Dillon, on the very night in question slept at Gravesend, and was at Gravesend during the whole night, and consequently could not have been at the "Sir John Falstaff." The connection of two of these witnesses with the party accused would induce the Court to watch their testimony with caution; but neither on principle nor authority, are they, on that account alone, to be denied credence; they are capable witnesses, and nothing could be more absurd, than that Mrs. Drury, the mother, is to be examined, and *à priori* not credited; in my judgment, as was often stated by Sir *John Nicholl*, the proper course is this,—when you examine the testimony of witnesses nearly connected with the parties, and there is nothing very peculiar tending to destroy their credit, when they depose to mere facts, their testimony is to be believed; when they depose as to matter of opinion, it is to be received with suspicion. Now if Mrs. Drury, Janet Rumball, and Emily Dicks, are to be believed, it is manifestly impossible that Mrs. Dil-

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in saying, that it is marked with circumstances of gross or palpable inconsistency; moreover, she is confirmed in all her reasons for being certain of the day, by her daughter, by Elizabeth Lloyd, and by Emily Dicks. I do not think that, properly speaking, they are at all to be considered as witnesses exposed to suspicion.

Elizabeth Lloyd, as far as appears to me, is as credible a witness as any one who has been examined in the cause; she does not attempt to go beyond facts in her own knowledge; she states that she was engaged to go to Mrs. Drury's house on that day, for the purpose of making up a dress; she does not attempt to carry down the presence of Mrs. Dillon at Gravesend later than six o'clock; if she were a forward witness, or produced for the purpose of her establishing an *alibi*, she would have gone further, but she confines her evidence to facts in her own knowledge, and states her reasons for remembering the precise time; the circumstance of Thursday being New Year's day is common to both sides as a mark whereby to fix the day. What was the circumstance which occurred to Lloyd on that day? not simply, that in consequence of the arrival of Mrs. Dillon, she was disappointed at sleeping at the house, but that she had to go, at six o'clock on a night in December, to the village of Northfleet, to sleep with her sister: I think that was a circumstance fairly calculated to make an impression on the memory of the witness.

In proceeding to try the evidence of Emily Dicks, I shall first observe, that there is nothing in her evidence, to induce me to say, that she is a less credible witness than Frances Goff; they are both

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this is acted upon by the Court of Chancery, where the facts stated by one witness only are denied by the answer of a party ; although I do not think that the principle could always be carried out in these Courts. On the one hand, then, I decline imputing to Dr. Dillon any culpability ; on the other, I do not fix on Emily Dicks the charge of falsehood.

Now this is the evidence of these seven witnesses as to the great point in dispute, namely, where Mrs. Dillon slept on the night of the 29th of December, and I am compelled to say that, upon the examination of this evidence, on whichever side the truth may be, I find myself placed in this painful predicament, there is not sufficient to enable me to say that either party has been guilty of wilful perjury ; and if either party has been guilty of mistake, it is equally difficult to account for it. In such a case, it behoves the Court to advert to the other facts with great caution.

To proceed then to the other parts of the case,—the conduct of Dr. Dillon, before and after the discovery of the alleged adultery, and what took place, as regards the witnesses, as regards his wife, and as regards the unknown adulterer ; and here again the same observations apply as to the credit of the witnesses.

First then, as to the evidence of the manner in which the alleged adultery first came to Dr. Dillon's knowledge ; this is given by Mrs. Wilson in answer to the *seventh* and *eighth* interrogatories, and the truth of this statement cannot be denied, without impugning the veracity of one of the most important witnesses examined on behalf of Dr. Dillon,—the witness

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diately recognised her, I went up and said " Good morning Ma'am, I hope you are better, Mrs. Wilson and myself thought we should have had the pleasure of seeing you at Gadshill again before this ; your good gentleman was at our house a short time since, and said, he should bring you down again as he thought it benefitted your health." Now this appears to me, to be a most singular mode of addressing her ! and it seems that this unknown gentleman had been to the house subsequently, and as is pretty clear from the evidence, had stated his intention of re-visiting the inn. The witness goes on, " Dr. Dillon and his wife then stood up, and he questioned her about what I had said to her, addressing her by her Christian name, which I do not now remember, ' My dear,' says he, ' what does this mean ? Your good gentleman, what does this mean ? '"—why Dr. Dillon was perfectly cognizant of this before ; I cannot help saying that here is a strong appearance of an arrangement for the purpose of proving identity. [The witness proceeds.] " Addressing me, he, (Dr. Dillon) said, ' I am this lady's good gentleman ? '" Why, Mr. Wilson knew that—it was a very gratuitous piece of information ? " I am her husband, was it I who was with her at your house ? I told him no, and he proceeded to question me further as to his wife, and as he was so doing, Mrs. Dillon squeezed my arm. I continued however. He appeared very much cut up, and putting his hand to his forehead, he turned round." If Dr. Dillon had believed this witness he was before this time convinced of all that had occurred, and if so, it is somewhat singular that he should have conducted himself in such a manner. The reason why

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Mrs. Dillon; on that very day, the 11th, she is joined by Dr. Dillon, on her return from Gravesend, and near her mother's house, in the presence of Dr. Dillon, Mrs. Dillon is served with the citation in the cause; and then what takes place? Why that which I should think is quite unprecedented in these Courts, Mrs. Dillon walks away and joins her husband! Before commenting more particularly upon this, I will follow the evidence; after the citation is served, while the cause is going on, Dr. Dillon had two interviews with his wife, the one on the 30th May, and the other on the 4th of July; they took place in the evening, and lasted for no inconsiderable space of time,—from three to four hours; they walked arm in arm together, and shook hands at parting.

Having stated the evidence, I must now consider its weight and bearing; this is no ordinary case, there are many points deserving the greatest consideration, my judgment must be founded on no one isolated fact, but upon a view of all the facts and circumstances. This is, I repeat, no ordinary case, for many reasons, and especially for this, that Dr. Dillon had previously to the marriage seduced his wife: I think it never can or ought to be maintained, that a husband, who seeks to be divorced from his wife, which wife he had first seduced, is not to expect his whole conduct to be examined into with more vigilant scrutiny and more rigid investigation than where no such connection has existed: if he has paved the way to her first fall, he ought to take care that he does not smooth the path to a second. Dr. Dillon has furnished no evidence as to the terms of their

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these letters were written: he did nothing to prevent the consequences likely to result: he receives warnings of the danger, and totally disregards them: again what does he do, after he had had the two interviews with Mr. and Mrs. Wilson? He continues to cohabit with his wife. Is this justifiable or not, is it sanctioned by the principles laid down by these Courts? What does *Oughton* (a) say, when speaking of the causes which prevent separation, although adultery has been committed, that if the party proceeding shall have had "*notitiam saltem probabilem criminis commissi*," and shall continue cohabitation, that is condonation, and he then proceeds to say what this *probabilis scientia* is, if the witnesses had signified to the party that they could depose to the adultery "*ex propriis eorum visu et scientiâ*." In this case the husband had received a letter informing him of the adultery, he had heard from the witnesses all which they have since deposed to, he had heard Mrs. Wilson speak of the mark in the eye, and the means of identification, he had declared it must be his wife, and according to the witnesses he was much affected, and yet he continued the cohabitation.

In excuse of Dr. Dillon's conduct, the case of *Elwes v. Elwes* (b) has been cited, or rather a dictum of Lord *Stowell's* in that case, for there condonation was not pleaded, nor was the *probabilis scientia* proved; on the contrary, it was rather disproved. To that dictum of Lord *Stowell's*, I am

(a) *Oughton*, Ordo. Judiciarum, tit. 214.

(b) 1 Cons. Rep. 292.

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together : he has taken an onus upon him, which, in ordinary cases, does not lie on the complaining party ;"—Now in the present case, condonation is expressly pleaded, and it is true, that in this case, on the 9th of May, Wilson had not had a personal interview with Dr. Dillon, yet all the other circumstances being well known, I cannot but think, that it is very difficult to escape from one or other of these conclusions ; first,—that Dr. Dillon did not give credit to the story, or secondly,—that he was very reckless whether he continued cohabitation with her or not after the adultery was known to him,—the latter, perhaps, is the most probable. I have thought it my duty not to leave this point unnoticed. The principle laid down by *Oughton*, is never to be lost sight of, at the same time acting on what was said by Lord *Stowell* in *Elwes v. Elwes*, I am not disposed in the present case to hold, that if these were the only circumstances unfavourable to his claim, such circumstances standing alone would bar the husband of his divorce.

I have already adverted to the fact of Dr. Dillon being present when the citation was served upon his wife, which appears to me to have been a very unbecoming proceeding ; then with regard to the two interviews with the wife during the pendency of the suit, I have great doubts whether the Court, had these facts been brought to its notice at the time, would have allowed the case to proceed ; moreover, all explanation as to these visits has been refused. I looked at the answers of Dr. Dillon, to see if he has given any explanation, but I find that he has refused to give any answer with regard to these interviews. In such a case no facts ought

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indispensable to the discovery of the truth. In ordinary cases, proceedings at common law are unnecessary,—indeed they are often of no advantage; but that is not so in this case, where the identity of the alleged adulteress as the wife are at issue, in such a case a *vivá voce* examination becomes of paramount importance; it is quite manifest that in a case of contradictory evidence, the confronting the witnesses, and the opportunity of cross-examination tend to throw more light on the real facts, than can possibly be done by written examinations.

Taking then the whole of the circumstances into consideration; here is a charge of adultery on one single occasion, preceded by no one fact of improper freedom, or even of acquaintance tending to make it probable, proved by three witnesses, whose veracity there is no ground to deny, but whose testimony is corroborated by no other circumstances sufficient to establish adultery, and opposed by the testimony of four other witnesses, to whom, in equal justice, veracity is to be conceded. As far as concerns the wife, in effect, this is not a civil but a criminal proceeding, and, if there be any doubt, she is entitled to the benefit of it; the evidence perhaps may preponderate in favor of the husband, but I cannot say that it is free from reasonable doubt. I do not, however, refuse to grant the divorce on this ground alone, but looking at all the circumstances before marriage, the neglect of repeated warnings to the husband after the marriage, indirect from the absence of the wife from home, direct from letters written to the husband, to the continued and unjustifiable cohabitation after the alleged discovery of the adultery, to the reck-

1842. the witnesses opposite to their names, and after-
 May 27th. wards the deceased placed a seal opposite to his
 name.
 In the Goods of
 JAMES BYRD,
 deceased.

Burnaby prayed probate, submitting that there was a distinction between this case and that of *Olding, deceased*, (a) in which the deceased signed his name after the witnesses, there being the further act of sealing by the witnesses, which might be considered a re-attesting, after the deceased had signed the will in their presence.

SIR HERBERT JENNER FUST.

There appears to me to be no real distinction between the two cases. My opinion is, that the witnesses should subscribe the will after the testator has signed it. I must reject the motion ; the parties, if they please, may propound the paper.

(a) *Olding, deceased*, 2 Curt. 865.

1842. *In the Goods of EDWARD COLMAN, deceased.*
 May 27th.

Motion for probate of a will signed by the deceased in the presence of two witnesses, but subscribed by them in an adjoining room, communicating with folding doors, but in such a situation that the deceased could not see them, rejected.

EDWARD COLMAN died at Naples, on the 2nd of April, 1842. On the 25th of March, the deceased being ill in bed, two persons were called into his bed-room for the purpose of seeing him sign his will, and to attest its execution ; the deceased then signed the will, in the presence of those two persons, but being apparently exhausted by the effort, the witnesses retired into an adjoining room, which communicated with the bed-room by folding doors,

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who drew the will, having been examined as a witness in support of the will, admitted, on cross-examination, that he had retained the proctor in the cause and was responsible to him for the costs; publication of the evidence had passed.

Addams and *Bayford* prayed the Court to rescind the conclusion of the cause, and to permit the witness to bring in a release and be re-examined, upon his affidavit that he had not seen any portion of the evidence; they submitted that the application so supported was in effect the same as if made before publication, and was therefore distinguishable from the case of *Godrich v. Jones* (a).

The *Queen's Advocate* and *Jenner* *contrd.*

SIR HERBERT JENNER FUST.

The Court gave notice in a late case (a) that under circumstances like the present, it would not permit a witness to be re-examined. Publication of the evidence has passed, and the proctor has seen the depositions of the witnesses, and he must have been aware of the rule of the Court, and of the incompetency of the witness; I do not think that the circumstances of the case are such as should induce the Court to depart from the rule laid down; it appears that the proctor, upon reading the depositions, discovered that the witness, Mr. Mogg, had admitted his responsibility for the costs, upon which he wrote to Mr. Mogg, desiring him not to look at the depositions, I dare say Mr. Mogg could swear that he has not read any part of the depositions, and that he gave his evidence without reference to

(a) *Godrich v. Jones*, 1 Curt. 630.

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sum to that originally given, and such substituted sum is not effectually given, the original legacy is not revoked, and that evidence is admissible to shew what was the original legacy; a decree was now taken out on behalf of Sarah Soar, the legatee, calling upon the executors to bring in the probate, and shew cause why the original sum should not be inserted—the executors by proxy authorized a proctor to appear for them, and consent to the legacy being inserted.

Haggard prayed the Court to direct the word “fifty” to be inserted in the probate.

SIR HERBERT JENNER FUST.

When this case came before the Court on a former occasion, the Court was of opinion that as the original word was entirely erased, evidence *aliunde* was not admissible to shew what the word was. The Judicial Committee of the Privy Council, having subsequently held, in the case of *Brooke v. Kent*, that in such a case evidence may be admitted *aliunde*, and the Court has now no difficulty in directing the word *fifty* to be inserted in the probate. There can be no doubt that the sum was originally fifty; and although it would have been more satisfactory, if the case had been brought before the Court by allegation, still as the sum is so small, and the executors are consenting, it is unnecessary to put the parties to the expense of propounding the will.

Let probate pass with the word “fifty” inserted. I should have considerable difficulty in directing the will itself to be altered.

1842. did not, however, oppose probate passing to
June 6th. J. G. Puckett.

In the Goods of
DEICHMAN,
deceased.

SIR HERBERT JENNER FUST.

The object of the deceased was, that there should be two executors of her will, and it appears to me that this party may have the probate.

The testatrix died in June, 1826, she appointed two executors, who are now dead, the survivor died in January last, intestate, but in his lifetime appointed J. G. Puckett to act as executor with him under a power given by the will, the party appointed did not take probate, he now applies for probate, and there appears to me in principle to be no difference between this appointment and that of two executors by a testator, and where one does not prove in the lifetime of the other. There was a case somewhat similar at the Rolls, in 1825 (a), in which it was said that the party appointed was not an executor, but a trustee only, but there is a material distinction between that case and the present, there the deceased had appointed five trustees for certain purposes, and gave a power to appoint others, that there should be always five executors; the object then was that there should be always five trustees, and the Master of the Rolls thought the deceased meant to continue the trustees perpetually, and not the executors, that the word executors had been used by mistake: here there are no trustees except as executors; I think that Mr. Puckett may take probate and appoint another to act with him.

(a) Frances Ashton, deceased.

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paper, it was propounded on behalf of the legatee, who had then lately intermarried with Mr. Thomas D. Mackenzie, one of the attesting witnesses to the paper.

The first plea was a common *condidit* given in by Mrs. Mackenzie; it pleaded the signature, "G. A. Barbor," and the two first words of the paper propounded to be of the proper handwriting of the testator.

The answers of the executor having been taken, a responsive allegation was given in pleading, in the *First Article*, the amount of the property of the deceased.

Second. The notoriety of his death, and actual knowledge of the fact by Mr. and Mrs. Mackenzie in July, 1839.

Third. The employment of Mr. W. Law, and subsequently of Mr. T. H. Law, as the confidential solicitors of the deceased, the ignorance of the deceased of legal business and phraseology.

Fourth. The will of the deceased.

Fifth. The existence of an illicit connection between the deceased and a Miss S., and the birth of a child; the great affection of the deceased for Miss S. and this child, and the settlement of 200*l.* per annum on the former secured by a bond.

Seventh. An illicit connection between the deceased and Mrs. Mackenzie, then Ann Melton, which commenced in 1834.

Eighth. That such connection entirely ceased on the 22nd of June, 1838.

Ninth. That during the period of such last-mentioned connection, T. D. Mackenzie was constantly in the company of Ann Melton.

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Nineteenth. An interview between the deceased and Mr. T. H. Law, as his Solicitor, with Mr. Gribble, on the subject of the advances and payment of the annuity, and a statement on that occasion that the advances had been made in respect of the annuity, and that the annuity was to be 80*l.*, not 100*l.*

Twentieth. A demand made by Mr. Gribble for the payment of the whole of the first half-year's annuity without any deduction whatever, and a refusal to allow the advances to be taken as payments. Great displeasure evinced by the deceased at the conduct of the Mackenzies, and the following letter, by his desire, written by T. H. Law to Mr. Gribble.

12*th* January, 1839.

“DEAR SIR,

“You will no doubt recollect the statement of Mr. Barbor, made to you on the subject of the Mackenzie's annuity; namely, that it should be nominally 100*l.*, but in reality that only 80*l.*, should be paid or demanded, and that he had paid 60*l.* on account of the first year's annuity. I have therefore to request that you will inform me, whether your client really means to require that the annuity shall be paid at the rate of 100*l.*, and to deny that the 60*l.* have been paid on account.

(Signed) “T. H. LAW.”

(Addressed) “W. GRIBBLE, ESQ.”

That on the same day, Mr. Gribble, Junr., called and stated, that the 100*l.* per annum would be demanded, and that no part of the 60*l.* would be allowed, as payment on account; and that

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Fifth. Mr. Gribble's answer to this letter.

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Twelfth. Pleaded the handwriting of Mr. Mackenzie as the witness to the asserted codicil.

The *Queen's Advocate* and *Addams* in support of the paper.

Haggard and *Jenner*, *contra*.

JUDGMENT.

SIR HERBERT JENNER FUST.

Mr. G. A. Barbor died on the 7th of July, 1839 ; he was unmarried ; his father was dead ; his nearest relation was Dr. Yeo, for whom he appears to have entertained considerable regard and affection. The personal property of the deceased is about 4000*l.*, and he also appears to have been possessed of real property of about 4000*l.* per annum, but this must be considered as incumbered to nearly one-half of its annual value. The deceased made a will in 1830 ; by it he has given a considerable amount in legacies to various persons, all charged on his real estate ; amongst others, is an annuity or rent-charge of 300*l.*, to a Miss S., in addition to an annuity of 200*l.* previously secured to her by a bond ; he has also given to his (natural) child 3000*l.* for her sole and separate use ; and has bequeathed other legacies, and amongst others, 3000*l.* to his executor ; he has charged all these incumbrances and his debts on his real estate, and has devised the residue of his real estate to his cousin Dr. Yeo, his heirs and assigns ; but, in case he shall depart this life without issue, then to his (Dr. Yeo's) brother, his heirs and assigns ; and he gives his personal estate to Dr. Yeo absolutely, and

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The body of this paper is in the handwriting of Ann Melton, with the exception of the two first words, which are pleaded to be in the handwriting of the deceased, the signature is also pleaded to be that of Mr. Barbor, and being so signed, in the presence of two witnesses, it would be entitled to probate. Assuming all this to be so. It has happened, that one of the two attesting witnesses has since become, and is now the husband of Ann Melton, and consequently, as this sum is not given to her for her separate use, this person has the presumptive interest in it in himself, and if this paper shall prove to be a good and valid codicil, T. D. Mackenzie will be entitled to this sum of 5000*l*. I mention this circumstance, because an objection (*a*) on the ground of interest, has, in a former stage of this cause, been taken to the evidence of T. D. Mackenzie, and his deposition has been rejected, he is not now a competent witness to prove the execution of this paper, however competent he may have been at the time of its execution; this circumstance, however, would not, standing alone, have the effect of preventing this paper operating as a valid codicil. The Court directed Mr. Mackenzie's deposition to be sealed up, and accordingly, it has been sealed up, and has not been seen. The Examiner was bound to take the examination of this person, indeed I think, that in the first instance, his examination was properly taken, although it has since, as properly, been rejected as evidence in the cause. It therefore now turns out, that there is only one witness to prove the execution of this

(*a*) See Mackenzie v. Yeo, 2 Curt. 509.

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answer from Mr. Gribble, bearing the post-mark of the 3rd of August, 1839 ; therefore, there can be no doubt of this, that Mrs. Mackenzie did communicate to Mr. Gribble the fact that she had such a paper in her possession, and directed him to make an assertion of that codicil ; and it further appears, that the knowledge of Mr. Barbor's death did not reach her until about that time. This fact does away with any prejudice which would otherwise arise from Mrs. Mackenzie not having previously mentioned this codicil ; still, however, Dr. Yeo, up to the end of November, had no knowledge that such a paper was in existence ; that appears on the evidence and letter of Mr. Gribble, who, it seems, thought it prudent to keep back the codicil, in order, first, to make inquiry whether any mention had been made of this codicil in the will of the testator, of the date of which he was ignorant at the time. After the lapse of a fortnight, about the 17th or 20th of August, Gribble saw T. H. Law, and inquired of him, *not* whether there was any mention of this codicil in the will, but whether any mention was made of Mrs. Mackenzie's name in the will. Under these circumstances, I think the responsive plea of Dr. Yeo is quite justifiable : until the latter end of November, he did not even know of the existence of this codicil, for although it is true, that on the 23rd of November, 1839, a letter, containing a copy of the codicil, was sent by Mrs. Mackenzie to Mr. Gribble, it was not until two days after that letter, that any mention of this codicil was made by Gribble to T. H. Law. The evidence proves this :—Gribble says “ he asked

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Now it has been admitted, that Dr. Yeo was justified in making these inquiries of Lake in the first instance, but it is said, that he ought to have been satisfied with the result of them, and perhaps, if that had been the whole of the case, he would have been; but I cannot say, that the mode in which Dr. Yeo and Mr. Law acquired their knowledge and information, as to the existence of this codicil, were of such a nature, as bound them to assume that it was a genuine document:—I see no fault to find with them, or with their legal advisers, in coming to a determination that the codicil should be opposed, and the circumstances of the case be investigated.

It has been said, as a reason why Mr. Gribble did not previously mention the existence of the codicil to Mr. Law, that Gribble considered Law had given him evasive answers to his inquiries respecting the will of the testator: it seems Gribble asked to see the will; Law declined to shew it, saying, “that it was in process of being proved, and he might see it at Doctors’ Commons.” I see nothing objectionable in this answer, or anything inconsistent with Mr. Law’s professional conduct; even if it be an excuse for Gribble not having then disclosed the fact of the codicil to Law. Gribble, however, takes no further notice of this remark; surely! after being told that the will was at Doctors’ Commons, this was the time to bring forward the codicil. I see nothing in all this which is evasive on the part of Law, and the rather so, as the main inquiry was, whether he knew of any codicil to the will? It has been said in argument, that the codicil

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cohabit with Mr. Barbor; she resided abroad, and was occasionally joined there by him, and then they cohabited together; indeed, at the time of his death, he was travelling with her; a relation of his own and of Dr. Yeo's was also travelling with them, and he proves, that at the time of his death Mr. Barbor's affection for Miss S. continued unabated.

In the year 1834, the deceased formed a connection with Miss Melton, (the party in the cause,) whose character, previous to this, the Court has no reason to assume to have been anything else than unimpeachable, at all events, it was not such as to cause any observation in Barnstable; she kept a respectable day-school, though, of course, when once her connection with Mr. Barbor became known, her scholars were withdrawn. There is nothing in the evidence to lead the Court to the conclusion that she lived otherwise than respectably until the time when her connection with Mr. Barbor commenced; I am bound to assume that there was nothing in the conduct of these two parties towards each other which could make the connection known in Barnstable previous to the time, when by some means or other it did become known. It appears, that Mr. Barbor visited Miss Melton at the house of some persons named Beaseley, where she then resided, and T. D. Mackenzie boarded in the same house, whether for a long or short time before the connection between the parties was known, does not appear; but, if Mr. Barbor's visits were of frequent occurrence, it must have become known to Mackenzie, more particularly as at this time he appears to have been paying his addresses to the

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rated by the solicitor and witness of the opposite parties. I see no reason to doubt the testimony of T. H. Law ; true it is, in his cross-examination, one or two of the interrogatories are not quite fully answered, but yet I see no reluctance—no shrinking from giving testimony. Now, his account of the transaction as to the bond given to Miss Melton is this : that in June, 1838, Mr. Barbor returned from the continent to Barnstable, and on his arrival, found several letters addressed to him from T. D. Mackenzie, couched in language of great violence, the effect of which letters, Mr. Barbor at once communicated to the deponent Law. Now I dwell on these minute particulars, because the real question in this case, is the probability of the provision of 5000*l.*, and in all these sort of cases,—where it is not a trial of sanity or insanity—but whether a particular act is really and truly the act of a party deceased, every—even isolated—fact is of importance. *Primá facie*, the *onus probandi* is on the party setting up the instrument ; it does not, in the first instance, lie on the other side to negative it. Then I come to consider what is the amount of proof required from the party, whether the *onus* is satisfied by the examination of the attesting witnesses, and whether, their testimony being in favour of the due execution of the instrument, the other side is then to be called on to shew—(I allude to cases where the general credit of the witnesses stands unimpeached)—that by reference to the general circumstances of the case, credit—by this I mean credit in a legal sense—cannot be given to the testimony of the witnesses. Now *primá facie*, in this case, the *factum* of the instrument is established ; then what are the circumstances

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that he said to Mr. Russell, "that his connection with her was over." I look then to the conduct, coupled with the declarations of Mr. Barbor, on the days of the 29th of June and the 4th of July, 1838; on this last day—two days before the codicil!—he went to Mr. W. Law, who was then at Instow, in Devonshire; on this occasion, he said, "both Miss Melton and Mackenzie had behaved very ill; that they had got too much out of him, and Mackenzie had written several threatening letters to him;" and, in Law's opinion, "nothing could be more improbable, than that the deceased should have made or contemplated the making, such a provision for Miss Melton." So far then it does not appear at all probable, that the deceased would make any further provision for her. On the 15th of November, 1838, it seems an application was made respecting the payment of the first instalment of the bond, and made by Mr. Gribble, who called on Law to inquire how the annuity was to be paid? it being the intention of Miss Melton to leave Barnstable; Law thereupon communicates with Mr. Barbor on the subject, and Mr. Barbor stated, that nothing was due on the bond, as Miss Melton had had 60*l.* on account, and also that the annual sum to be paid on the bond was to be 80*l.* and not 100*l.* This Law communicated to Gribble, who, on a subsequent day, answers, that his clients did not admit that anything had been paid on account of the annuity, which also could not be taken at a less sum than the bond stated. In consequence of this, T. H. Law and Mr. Barbor go together to Gribble, and Mr. Barbor's version of the story is given,

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paid to Mrs. Mackenzie several sums on account of the first year's annuity, and amounting to 60*l.*, and further, that Mrs. Mackenzie did engage, when the bond was given to her for 100*l.* a-year, never to claim more than 80*l.*, the 100*l.* mentioned in it having been inserted merely to shew to her friends, or to that effect. Mr. Barbor then, in my presence, either repeated what I said, or assented to it. Mr. Gribble listened to the statement, and said, he would see his clients upon it." Gribble says, he does not recollect whether the subject of the amount of the annuity was mentioned or not; Law says that it was, and Law is confirmed by Gribble as to the greater portion of his statement, and he is not contradicted as to the rest; moreover, Gribble admitting that this conversation took place in the presence of Mr. Barbor, goes far to confirm Law, because, unless Mr. Barbor had really made such statements to Law, he never would have taken him to be present at the interview between himself and Gribble. On the 11th of January, 1839, Mr. Gribble, Jun., demanded payment of the first half-year's annuity; Law says in his deposition, "I declined to pay him until I had seen Mr. Barbor. I did see him, he was very angry indeed at the conduct of the Mackenzies; we discussed the matter with a view to the means in his power of defeating the fraud, as he insisted that it was; he was as angry as a man could well be; he declared it to be a gross cheat, and it was a matter of discussion between us whether the bond itself could be got rid of altogether; at length it was determined that I should make one effort more by letter, and if that failed, I was to pay the money." Then he states that he

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was written without any alteration ; then, what is the consideration stated ?—these charges ; is it true that they were false and calumnious ? is it not notorious that Mr. Barbor had been connected with Miss Melton. However, to recur to the *factum* of the paper, I will now consider the evidence of G. Lake, the only witness : he says “ I knew Mr. Barbor by sight, almost as long as I can remember anything. I never spoke to him, unless on the only time I ever was in company with him, which was when he signed the codicil, and I do not know that I spoke to him then ; at the time of which I am about to depose, I was in the service of Messrs Cook, Druggists, in Barnstable. I had frequently seen my fellow witness, Mr. Mackenzie, there, at that time ; I knew Miss Melton, now Mrs. Mackenzie, by sight, but no more. One Friday, it was market day, in the summer, two years ago come next June or July, I was going up the High Street, early in the afternoon, I think, I remember I had not been to dinner, Mr. Mackenzie tapped on the window to me, as I was passing on the opposite side of the street, he was in Miss Melton’s front room up one pair ; I stopped, he beckoned me, I went to the door, he came down to me, opened the door and asked me to walk up stairs, that he wanted me for something ; I followed him up into the room, Miss Melton was sitting at a table, writing, Mr. Barbor was standing behind her looking over her shoulder, she was not copying any other paper, it appeared to me that he was telling her what to say, but I did not hear him say anything to her distinctly.”

Now I confess that I cannot imagine how Mr.

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name to it, then I signed mine; one or both of them, I think both, said to me. 'Now young man,' and so stepping forward I wrote my name under that of Mr. Mackenzie; when I had so done, Mr. Barbor gave me half a sovereign, and bade me say nothing about it. His words I think were,—“Young man, I hope you will keep this to yourself and say nothing about it to any one, as I do not wish it to be known.”

Undoubtedly this witness proves sufficient to shew that the act of Parliament, (1 Vict. c. 26, s. 9,) has been complied with. Lake goes on to identify the paper, as the one so signed, and he says, “there is one change in it, it was a whole sheet then, it is only a half one now.” It has been urged in argument, that this fact is very strong in confirmation of Lake's evidence, inasmuch, as it has been proved in the cause, that the codicil was written on the other half sheet of paper on which the bond was written; I lay no stress on this, if the evidence of Lake is not sufficient without being corroborated by this fact, I do not think this will confirm it. It is said,—indeed it is proved, that in 1832, Lake left Barnstable, and went to live in Exeter. In 1839 Mr. and Mrs. Mackenzie came to Exeter to reside, but Lake says, “they never had any conversation about the codicil, until about three months before his examination.” In his cross-examination, Lake says, “Mackenzie called on me, he told me, I should be required as a witness. Mr. T. H. Law next called on me, it might be about a fortnight after Mackenzie had been with me; he asked me “if I knew him, I said ‘Yes,’ and I told him who he was, he asked me, if I knew Mr. Barbor of Fre-

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peachable character has been guilty of perjury ; it is the duty of the Court to weigh the whole of the evidence, and then to determine whether it is such, as to satisfy the mind of the Court, that this was the act of the testator, Mr. Barbor. Here are parties setting up an instrument, and it is the duty of the Court,—the Court is bound to sift the evidence, and then to say, whether or not it is sufficient to support such a document as this. The Court is not bound to pronounce that a party has been guilty of perjury, but, giving credit to his testimony, is to say, whether it can give such effect to it, as to pronounce this paper to have been the act of the testator.

The only remaining question is, regarding the handwriting of the testator. The great bulk of the interrogatories apply to this part of the case ; a great number of witnesses depose to the signature not being of his handwriting, and as great a number that it is. Evidence of this nature is always unsatisfactory, it never leads to a sound conclusion ; I cannot try this question on evidence of handwriting.

[The Court then went very minutely through the evidence as to the handwriting, and observed, at the conclusion, that no one witness gave positive evidence either way.]

Is not then the evidence of this single witness, Lake, even admitting him to be a witness *omni suspicione major*, so affected by the whole transaction, and by the great improbabilities of the case, that the Court cannot pronounce for this paper, on his sole testimony. The parties propounding the codicil, labour under the disadvantage

1842. left an only daughter, who had, since his death,
 June 23rd. intermarried with Alexander Gove. The de-
 ceased made a will, bearing date the 7th of July,
 1839, signed by him, and subscribed by two wit-
 nesses; the purport of it was, to give to trustees
 3600*l.*, new three-and-half per cents., upon trust to
 pay the dividends to his daughter, for her separate
 use during life, and at her decease, in case she
 should leave any children or a child surviving, to
 divide the principal money equally between such
 children or child, and the child or children of his
 cousin James Gawen, and of his sister Jane Pres-
 cott, and of his niece Jane Gawen, as should be
 then living. But in case his daughter should not
 leave any children or a child, then he directed his
 trustees to pay the said dividends to his said sister
 for her separate use, during life, and at her decease,
 or in case of her decease in the lifetime of his
 daughter, to divide the principal equally between
 the children or a child of the said James Gawen,
 Jane Prescott, and Jane Gawen. And he gave
 the further sum of 2200*l.*, three-and-half re-
 duced Bank annuities to his trustees, upon similar
 trusts, as declared concerning the sum of 3600*l.*,
 (with the exception that the life interests given therein
 to his sister and daughter, were transposed). The
 testator appointed his said cousin, James Gawen
 the elder, James Gawen the younger, and James
 Terry his executors. The attestation clause was as
 follows: "Signed, sealed, published, and declared
 by the said Henry Prescott, the testator, as and for
 his last will and testament, in the presence of us,
 who in *his presence of us* (a), who in his presence,

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(a) So in the original will.

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“ I had been instructed by the deceased to prepare his will. On Sunday morning, the 7th of July, I was sent for to attend the deceased ; I went, taking with me the will. Upon going into the deceased’s bed-room, I found his sister there ; the deceased begged her to leave the room, which she did. I sat down by the bed-side, and read the contents of the will over ; I said ‘ We shall want a light to seal with, and also another witness ;’ the deceased called his sister to fetch a light, and she was then informed, either by me or by the deceased, that a second witness was wanted. Whilst she was gone for a witness, I affixed a seal to the will ; in a few minutes she returned, bringing with her a person. I then, as I now best recollect and believe, gave the will, which I had read over, into the deceased’s own hands, and in the presence and hearing of my fellow subscribing witness, I dictated, and the deceased, after my dictation, deliberately repeated these words : ‘ This is my will, it is as I wish it, and I wish you to witness it ;’ and the will being then placed before the deceased, he, in my presence, and in the presence of G. Stanley, signed his name at the foot of each sheet of the will, and upon completing his signature on the last sheet thereof, he, by my direction, touched with his finger the seal affixed thereon, and declared such to be his act and deed. The will was then attested by myself and by Stanley, by our signing our respective names to each sheet thereof, and our initials against certain alterations in the will, in the presence of the deceased and of each other. Neither of us had quitted the room from the time of Stanley first entering the same, until after the

will had been executed and attested. The alterations in the will were made in the presence of the deceased, previous to the execution by him of the will.

George Stanley, (the other subscribed witness,) deposed, "I was acquainted with the deceased for upwards of twenty years. On Sunday, the 7th of July, 1839, I was going towards the house of the deceased, I saw his sister stop a Mr. Fisher, she said, seeing me, 'never mind, here is Mr. Stanley, my brother would rather have him,' I went with her into the deceased's bed-room, I found him with Mr. Cattarns, the latter said, 'have you any objection to sign Mr. Prescott's will,' I replied, 'No,' he said, 'I suppose you don't wish to hear it read,' I replied, 'if Mr. Prescott is satisfied, I am.' At this time, the will was lying on a small table in the room : Mr. Cattarns asked me to sign the will, and I signed my name to it, I believe four times. I had not at such time seen the deceased sign the will, but at the time of my signing, I am sure that I saw Mr. Prescott's handwriting to the will : I saw his name written close to the place where I signed ; not more than one minute passed between the time of my entering the room and the time of Mr. Cattarn's asking me to sign. The will had not, at least while I was in the room, been in the hands of Mr. Prescott before I signed, but it was lying on a small table. Besides signing my name four times, as I believe, I set my initials in the margin. After I had signed, I turned about, and went to the bed-side, and spoke to the deceased ; during this time Mr. Cattarns was behind me where the will was. I did not see him sign the

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occasion; two years and a half elapse between the time of the execution of the will, and of his examination in the cause; it is very possible Stanley may have forgotten the circumstances; he may have heard remarks made in conversation as to the nature of the will, and may have had an idea so impressed on his mind, as to lead him to the belief that the will was not actually signed in his presence; but there is no absolute necessity for saying that he is perjured.

It has been urged, that Mr. Cattarns has a strong bias to sustain his own act, inasmuch as, being the solicitor called in to draw and advise as to the execution of the will, he must consider his professional reputation at stake, if he has not conducted the transaction in a legal manner, so as to sustain his act. If this is to throw suspicion on his testimony, it is a circumstance which will go to the credit of every solicitor, who is called on to give evidence in this Court with respect to a testamentary business transacted by him; for no solicitor can give evidence on such a point, without feeling, that to some extent at least, his professional character is at stake. Am I to presume that Mr. Cattarns has misrepresented the facts, in order to substantiate this will, and that, after making the affidavit of the 29th of July, to which I have before alluded, Mr. Cattarns could, in the short interval of the few days which elapsed between the date of the will and the affidavit, have forgotten the circumstances attending the execution of it. The question is not one of credit between two witnesses, both similarly circumstanced as regards the facts of a case, but between two witnesses, one of whom

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being placed opposite it, and with this alteration the will is approved of by the deceased; a light is brought, a seal affixed; another witness is sent for, and Stanley is met with; he is asked to attest, and, according to his evidence, he does so; the whole story shews the will was prepared with the utmost deliberation.

Under these circumstances, I think, without reflecting the least on Mr. Stanley, that I am bound to give credit to Mr. Cattarns. I confirm the will, and direct the probate to be re-delivered out.

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A. B., (deceased), requested two persons, present at the same time "to sign a paper for him," which they did in his presence; the paper was so folded, that the witnesses did not see any writing whatever on it; A. B. did not state what was the nature of the paper in question. On the death of A. B., it was found to be his intended will.

ILOTT *against* GENGE.

The Rev. H. Masterman, the Vicar of Milton Abbas, in the county of Dorset, died on the 8th of December, 1841. On his death, a testamentary paper was found, dated the 8th of September, 1841, it was in the handwriting of the deceased, signed by him, and the names of three witnesses appeared subscribed to it. The attestation clause was as follows:—"Signed, sealed, and delivered in the presence of us, this 8th day of September, 1841, Samuel Hopkins—Henry Eaton—John Chaffey." This clause not shewing that the 9th section of the 1 Vict. c. 26, had been sufficiently complied with, the subscribing witnesses were applied to, to make an affidavit in the form required by the Prerogative

Held, that it was not entitled to probate, the provisions of the 9th section of the 1 Vict. c. 26, not having been complied with.

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ink-bottle, and which apparently the deceased had been just using, and signed his name in the testator's presence, and in the presence of Eaton, and Eaton also signed his name in the presence of Hopkins and of the deceased, but that the upper part of the paper was so folded or turned down, as to conceal the writing on the concluding part thereof, so that Hopkins and Eaton could not see whether or no there was any signature or seal to it. That the deceased, on the same afternoon, called on J. Chaffey, and requested him to put his name to the paper, under those of Hopkins and Eaton, which he accordingly did; that the paper was again so folded or turned down, as to conceal the writing on the concluding part thereof, but neither Hopkins or Eaton were present when Chaffey signed."

The *second* Article pleaded the handwriting of the deceased to the paper.

The subscribing witnesses having been examined, it appeared by their evidence, that the deceased did not sign the paper in their presence, and that they never saw his name or seal to the paper.

The case came on for hearing.

Haggard and *R. Phillimore* in support of the will, argued, that this was a will which the Court would be anxious to support. That in *White v. Trustees of the British Museum* (*u*), and *Doe dem. Jackson v. Jackson* (*b*), the question, whether the signature of a testator to a will was made before the witnesses subscribed, was left as a fact to a jury, and a jury will presume the fact to be one way or the other on the reasonable probabilities of a case. That

(a) 6 Bing. 310.

(b) Coram, Parke, B., North Circuit, 16th March, 1842.

1842. the witnesses in this case, would be to do so in the
 July 19th. teeth of the evidence.

—
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In reply, *Starkie on Evidence*, (p. 1685,) and
Peate v. Ongley (a) were referred to.

JUDGMENT.

SIR HERBERT JENNER FUST.

The Rev. H. Masterman died on the 8th of December, 1841; he left a will, all in his own handwriting, dated the 8th of September, 1841, signed by the deceased, and with an attestation clause, "Signed, sealed, and delivered in the presence of," (three persons,) Samuel Hopkins, Henry Eaton, and John Chaffey. The signature of the deceased, and the date of the year in which the execution took place, appear to have been inserted after the body of the will was written:—the purport of the will is to give legacies to friends and servants. [The Court stated the contents of the will, and proceeded.]

Now this is a will which the Court would be disposed to support, if, under the circumstances, it can do so; there can be no doubt of the intention of the deceased, that it should operate as a disposition of his property.

The will is propounded by Mr. Ilott, the executor, who is a legatee in a sum of 400*l.*, and is opposed by Mrs. Margaret Genge, a second cousin of the deceased. The question is, whether it is executed pursuant to the provisions of the 9th section of the 1 Vict., c. 26, inasmuch, as the attesting witnesses did not see the testator write his name, so as to be

(a) Com. 196.

1842. the door at which we entered. He was doing
July 19th. something to a paper," (no doubt it was this very
LLOYD paper) "for I could see a portion of it, I think he
against was folding it." "It was at that table and desk
GENOE. that he did all his writings, then he used to be
sitting, for it was high enough for that, and no
more, but at the time of which I am speaking he
stood leaning forward; I am sure he was doing
something to the paper, folding it I think, I could
not swear that he was not writing, but I think, if he
was writing when we went in, I should have seen
and remembered his putting his pen into the little
glass inkstand in which it was when I saw it, as I
shall depose, and where it always was, at the right
hand corner of the little desk. He was standing
as I have said, but he often stood to write so much
as his name: his chair was close by. He stood for
perhaps, as much as a minute, and then turning
round, he said, (seeing us both,) addressing me,
'Well, Hopkins, you are come,' he had the paper in
his hand, the one I signed, and he then said that
he wished me or us, ('you, he said,') to do a little
job for him, or to that effect. I stepped forward,
and the deceased, holding the paper down on the
desk with one hand, told me to sign my name
'there' or 'here' pointing with the other hand
where. I saw no writing at all upon it, it was folded
in such a manner that whatever was upon it was
covered by the folding of it down. The place
where he told me to sign was up as close to the fold
as it well could be. The deceased took the glass
inkstand or flat bottle with the pen in it out of the
desk, and put it on the table by the side of the
desk, and then, as he pointed, I wrote my name,

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the mind of the witness is, that he did not sign in his presence, for on the second interrogatory, he says: "I cannot positively swear that Mr. Masterman did or did not sign his name in my presence, on the occasion in question; I have deposed to the best of my recollection and belief, to what passed, and to all that passed on that occasion; I am sure that he did not shew his signature to me; if it was there, I did not see it. He did not acknowledge it by any words spoken in my hearing, and my belief is, that he did not sign his name in my presence. I cannot at all say whether the name of the deceased had or had not been signed by him before he desired me and my son-in-law to witness it as we did. Mr. Masterman has frequently asked me to sign papers for him. I did not know what the paper was (which I so signed as I have deposed), when I signed it."

To the *third* interrogatory, he says,—

"I cannot swear that the deceased did write anything at all in my presence, on the occasion deposed of between the time when I so went to him in his study, and of my subscribing my name as I have deposed. If he did write anything, I do not know why it might not have been as well filling up the date, as signing his name."

The witness Henry Eaton, the son-in-law, deposes much to the same effect. He says: "Mr. Masterman had his back to us as we entered. The desk stood on a table up against the wall: I had often seen him writing at that desk, in that place. He commonly sat to write. He was a tall man, and had to stoop if he stood to do anything at that desk. When I went into the room, I saw nothing

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way for me, and I took his place. Whether Mr. Masterman took up the paper, which we had signed in our presence, or let it remain, I am not able to say ; I have seen blotting paper in the desk and on it before now, but I saw none and none was used that day. When we first went into the study (which is a very small room), I stood rather behind Hopkins, and could not see quite so well as he ; I should rather say Mr. Masterman did not than that he did write on the paper while we were with him ; I doubt if there was altogether time for him to have written and folded the paper too ; I do not call to mind anything else having passed ; Mr. Masterman certainly did not tell us what paper it was which we were signing." Then further on he says—"How the paper was folded on that occasion, I cannot now say, or how Mr. Masterman contrived it, but he did by some means cover it all up, except just the space left for us to sign as we did."

Upon interrogatories, this witness deposes very much to the effect I have already stated, with regard to the first witness. These are, in effect, the only two witnesses, for the third witness was alone at the time of his attestation of the will, and his attestation, therefore, would not be sufficient to comply with the requisites of the act of Parliament.

What is the result ? The witnesses are called in to attest a paper ; the testator is a tall man, standing at a table, which caused him to stoop ; he was doing something with the paper ; the impression made on the mind of the one witness is, that he was folding the paper ; of the other, that he was getting it ready for them to sign ; neither witness can take upon himself to swear that he saw the deceased

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notwithstanding I have a strong inclination to carry into effect the clear intentions of the deceased,—that the instrument was signed in the presence of the witnesses.

This brings me then to the second point, whether the signature was acknowledged in the presence of the witnesses ; I have already stated, that, notwithstanding the form of the plea, the Court would be inclined to give the party the benefit of any proof, which may arise from the circumstances of the case. It is not contended, that there was any express acknowledgment of a signature, that the deceased said, “ This is my signature, and I request you to attest it,”—the case must, therefore, rest on what may be considered a virtual acknowledgment of a signature : it is not necessary that a testator should state to the witnesses that it is his signature ; the production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the present statute.

This was the point most strongly pressed in the argument, and it was contended, that with reference to cases under the Statute of Frauds, what was done in this case was sufficient to constitute an acknowledgment of the signature : before I refer to the cases cited, it will be necessary to consider the wording of the two statutes,—the Statute of Frauds, and the statute 1 Vict. c. 26. By the Statute of Frauds, (29 Car. 2, c. 3,) “ All devises and bequests of any lands or tenements, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, or by his express direction, and shall be attested and subscribed, in

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foot or end thereof: this paper is signed at the foot or end by the testator,—there is no doubt of that. The section goes on, “and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.” Here it is enacted, not that the will shall be signed, but “that the signature shall be made or acknowledged;” some doubt was raised soon after the passing of the act, whether an acknowledgment was not confined to cases where the signature was made by “some other person” for the testator, but the Court was of opinion that the acknowledgment extended to the signature, whether made by the testator himself, or by another for him. (e)

The question, then, in this case is, whether there was an acknowledgment of the signature by the testator to two witnesses present at the same time? If there was such an acknowledgment, the statute has been complied with, for, undoubtedly, the two witnesses were present at the time of the acknowledgment, if any took place, and they subscribed the will in the presence of the testator. The first observation that arises on this is, that the wording of the present statute varies materially from the corresponding section in the Statute of Frauds; there nothing was said as to acknowledgment of the signature by the testator; a will, therefore, might be signed by the testator, or by some other person in his (the devisor’s, not the witness’s,) presence,

(e) In the Goods of *Cornelius Regan*, 1 Curt. 908.

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found, the Lord Chief Justice delivered the opinion of the Court.

In that case, then, it appears, that the deceased had signed his name to the paper before he produced it to either of the witnesses, that he produced it to two witnesses who did not see the signature of the deceased, and he afterwards produced it to a third witness.

[The Court read the statement of the case as reported in 6 *Bingham*.]

Serjeant *Wilde*, in arguing the case on the one side, says: "It is not required by the statute that the witnesses should see the devisor sign; or that he should sign in their presence: nor that all the witnesses should subscribe in the presence of each other: nor that they should know the instrument they have subscribed to be a will."

I refer to this on account of an observation of Lord Chief Justice Tindal, which here occurs: his Lordship says,—“If the will be not actually signed by the devisor in the presence of the witnesses, must it not be acknowledged as such to them?”

Then Serjeant *Wilde* answers; “The devisors desiring the witnesses to subscribe the instrument under the usual formulary of attestation, is a sufficient acknowledgment of his having signed it himself, and intending the instrument should be effective.”—Be it remembered, that it had been found that this will was actually signed at this time.—“There is no other object for which he can be conceived to have required their subscription. Consistently, therefore, with the decisions before referred to, the word ‘attested,’ as employed in the statute in conjunction ‘with subscribed,’ can only mean, that the witnesses

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that the inquiry is simplified, and reduced to this single question, whether the devise was attested by them within the meaning of the statute?"

The Chief Justice founds his judgment on the special verdict, and he says—having all these facts before him, all found by the special case—"It has been held in so many cases, that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same; but that any acknowledgment before the witnesses that it is his signature, or any declaration before them that it is his will, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witnesses complete. The case of *Ellis v. Smith*, which was decided by Lord Chancellor *Hardwicke*, assisted by the Master of the Rolls, Sir *J. Strange*, Lord Chief Justice *Willes*, and Lord Chief Baron *Parker*, all persons of high and eminent authority, is express to the latter point. The objection, therefore, to the execution of the present will, does not rest upon the fact that it was not signed by W. White in their presence; but that with respect to two of the witnesses, Hounslow and Bristow, there was no acknowledgment of his signature, nor any declaration that it was his will; but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written. And it is argued, that if such subscription of their names satisfies the intention of the statute, the word attested, will have no force whatever, and may be considered as if it had never been inserted.

"The question, however, appears to us to be,

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the signature of the three names, could not possibly enure to charge themselves, or any other person, and could not have been done for any other purpose whatever than simply to make them witnesses to the will. And, lastly, it appears from the same inspection, that immediately above the names of the witnesses, there was written, in the handwriting of the testator, these words, 'in the presence of us as witnesses thereto,' which do amount to a clear and unequivocal indication of the testator's intention that they should be witnesses to his will.

"When therefore we find the testator knew this instrument to be his will; that he produced it to the three persons and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his. For whatever might have been the doubt upon the true construction of the statute, if the case were *res integra*, yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the signing: we think the facts of the present case, place the testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made, and

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was, whether the deceased had acknowledged his signature to two witnesses present at the same time ?

The facts of the case are these, the testator called one of his confidential clerks into a counting-house, he produced a paper, and told him it was his will, (this witness was the only witness examined at the trial,) this paper was read over by the clerk in the presence of the testator, he knew what the will was, and that it was signed by the testator, who inquired of him who was likely to attest it as a second witness, he named another person, a second clerk, the testator was unwilling that the second clerk should know the nature of the paper, and on his being called in, he placed his arm on the instrument so that the second witness could not see the signature or know the contents of the paper, both witnesses attested in the presence of the testator, both witnesses were present at the same time, but when the will was produced to the second to sign, he did not know whether it was signed by the testator or not, by reason of the testator placing his arm on it. The first witness knew it was a will and signed by the testator, both subscribed it in the presence of the deceased ; the question was, whether this was a valid execution of the will ; the observations of Baron *Parke*, are these,—I think Mr. Baron Parke rather expected the verdict would be against the will.—He left it to the jury to say, whether it was the intention of the testator to acknowledge his signature to the second witness, he says, “ This is a dry question of fact which you have to decide, reference has been made to a case of *White v. Trustees of the British Museum* ; one question is, whether the testator meant the second

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from the first witness that on being called into the counting-house, he found the testator engaged in writing, so far as this witness is concerned, he not only shews him his signature, but gets him to read the will. It is also quite clear that he did not want Rowley, (the second witness,) to know that the paper he was called in to witness was a will. It is for the lessor of the plaintiff to shew that the signature was exposed, if it was, without the testator's saying anything, or if blotting paper were put over the signature, that would, I think, exclude any presumption that he intended to acknowledge his signature before the witnesses."—This shews the inclination of Mr. Baron Parke's mind, as to what amounts to acknowledgment.

The jury returned a verdict in favour of the will (a).

If that case had been decided by a Court of Law, it would have an important bearing on this case. In this case it has not been proved that the will was signed by the testator before the witnesses attested it, in that case it certainly was quite clear that it was signed at the time; the circumstances are very different; and I think Mr. Baron Parke expected that the jury would have found a special verdict, and left it to the Court to establish whether it was a will or not, it is evident Mr. Baron Parke had a strong doubt whether this was a sufficient execution. With reference then to the express direction in the statute, that where the will is not signed in the presence of the witnesses, the signature, (not the will,) shall be acknowledged, I am of opinion, under

(a) A rule for a new trial in this case was made absolute by the Court of Queen's Bench on Saturday May 6th, 1843.

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membered, procured by himself on his own oath as to the truth of its contents.

Per Curiam.—The ground of nullity set forth in the citation, is fraud in procuring the license, not imposition practised on the party in inducing the marriage.

[Argument resumed]. The identity of the parties actually married with that of the parties named in the license, stands confessed in the libel, and, therefore, *Sullivan v. Sullivan* (a) is in point, *Hawke v. Corri* (b).

The *Queen's Advocate* and *Harding*, in support of the libel.

This is the very case of fraud in procuring a license, which is contemplated in *Cope v. Burt* (c), as sufficient to invalidate a marriage; the name of "Terry" was here assumed by the party for the express purpose of inducing the marriage. Even if no imposition in this respect was practised on the husband, the ordinary has been imposed upon. Lord *Stowell*, in *Cope v. Burt*, says,—“There was no imposition on the ordinary, or on the minister, or on either of the parties, *Rex v. Burton on Trent* (d); *Ewing v. Wheatley* (e)” The ordinary may refuse to grant a license, just as banns may be publicly forbidden; if it is essential that the true names of parties should be given in the publication of banns, is it not equally necessary that the or-

(a) 2 Cons. 238.

(b) 2 Cons. 280.

(c) 1 Cons. 434.

(d) 3 M. & S. 437.

(e) 2 Cons. 275.

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both from the affidavit to lead the license and from the facts set forth in the libel, that it was the intention of Mr. Clowes to contract a marriage with a person answering to that name ; and it is also clear that he did marry the person whom by that description he did intend to marry. There is no error *de corpore*, if anything, it is error *nominis*. There is no averment in the libel that this marriage is invalid by reason of want of consent, of affinity, or other legal cause ; what then is the ground on which the Court is asked to declare this marriage to be null and void ? —Fraud ;—Of what description ?—In obtaining the license ;—In what respect ?—That one of the parties is therein designated by a name she was not entitled to bear. It, however, appears that previous to and at the time of the marriage, the party was well known to Mr. Clowes, she was living with him as his mistress. The particular circumstances of this case may be different from those of former cases of this nature, but the same principle must govern in all : I take it to be this—where there has been no error as to the person, and no fraud practised in obtaining the license, that is, such fraud as if known would have prevented the granting of the license, the marriage cannot be voided ;—this consider as the result of the decisions in *Cope v. Burt* and *Cockburn v. Garnault* (a). What then are the circumstances which are to distinguish this case from that of *Cope v. Burt* ? In this, as in that case, the party had previously to the marriage borne the name by which she was married, she not assumed it for the purpose of procuring marriage. In *Cope v. Burt*, the real name

(a) Cited 1 Cons. 435.

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Nov. 2nd. cannot understand, when it is said, this is a void
marriage, what is there to render it void? What
CLOWES is there to vitiate the license? there is no sub-
against stitution of one person for another; both parties
CLOWES. were able and willing, and meant to contract this
marriage; the whole of the contents of the libel
shew that neither of the two persons was deceived
by the substitution of one name for another. There
was no *error de personâ*, although there may have
been *error nominis*.

But in point of fact, in all these cases the distinction
has been established between a marriage by *banns*
and a marriage by *license*. The publication of
banns is a notice to all the world that the two par-
ties intend to contract a marriage, and the words
of the Act of Parliament are direct, "That the true
Christian and surname of the parties must be used,"
and therefore, if the banns are published in the
false names of both parties, the marriage is invalid.
A license is a dispensation from the necessity of
publication of banns, and is granted on such terms
and conditions as the ordinary is willing to accept;
in this case, the terms are contained in the affidavit
to lead the license, and on the oath of the party,
the license was granted and the parties married;—
a marriage so solemnized is not to be set aside on
slight grounds.

The present Marriage Act is the 6th Geo. 4,
c. 76, it was passed to amend a former Act, by
which great injury was found to be done to inno-
cent parties; for a marriage might be set aside in
consequence of a fraud committed by one of the
contracting parties. Under the present Act both

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libel, and assigned to hear on admission thereof on the first session of the next term.

On the first session of Hilary Term the costs were paid to the proctor for the wife, who acknowledged the receipt thereof in Court.

On the same day, the admission of the asserted libel was moved by *Addams* and *Jenner*; they contended, that it was competent to the wife to engraft a suit for restitution of conjugal rights on a suit of nullity of marriage. The *factum* of marriage had been admitted, and although the husband disputed its validity, the Court, by rejecting his plea, completely affirmed that marriage. They referred to *Wescombe v. Dods* (a), *Best v. Best* (b), *Hawke v. Corri* (c), *D'Aguilar v. D'Aguilar* (d).

No counsel or proctor appeared for the husband.

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A libel, by a husband, in a suit of nullity of marriage having been rejected, Held, that it was competent to the wife, in that suit, without taking out a cross-citation to sue the husband for restitution of conjugal rights.

JUDGMENT.

SIR HERBERT JENNER FUST.

This was originally a suit of nullity of marriage, by reason of fraud practised in obtaining the license. It was promoted by Mr. E. Clowes against Harriet Jones, spinster, a minor, falsely calling herself Clowes. In that suit, which came to this Court by letters of request from the Commissary of Winchester, a citation issued, an appearance was given by the party cited by her guardian, a libel was given in, stating the circumstances under which the marriage was celebrated, and the grounds of fraud in obtaining the marriage license, on

(a) 1 Rep. t. Lee, 59.

(b) 1 Add. 411.

(c) 2 Cons. 280.

(d) 1 Hagg. 785.

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tion of marriage the accused might plead that a marriage had actually passed, and in such a way as to give that party a right to claim the benefit of it, and if the accused obtained a sentence the Court would enjoin the accuser to return to matrimonial cohabitation; on consideration, I see no reason why, in a cause of nullity of marriage, the same principle should not be applied, and if in *Wescombe v. Dods* I had found, that the husband had been ordered to take his wife home, and to treat her with conjugal affection, that would have been a direct admission of the principle; but it does not appear, that Sir *G. Lee* did make such an order, his own report does not so state. In certain cases, it is competent to one party to obtain a sentence of divorce, where the suit has been commenced by the other party for the restitution of conjugal rights; but in those cases there is always a sentence in favour of the marriage. There are many cases, in which this Court, in a suit for restitution of conjugal rights, has received a plea of cruelty or adultery, and a divorce has been pronounced for in that suit, although originally commenced for restitution of conjugal rights, and that too, in causes coming to this Court by letters of request. If, therefore, an allegation, such as this, would have been received in the Court below, it is competent to this Court to receive such allegation; and then supposing the husband's libel had been admitted, the wife might have pleaded a valid marriage. Now comes the question whether, if she had proved a valid marriage, she could have obtained a decree for the restitution of conjugal rights. It was for some time considered that, in cases of this descrip-

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have to determine : for, if she was not justified, I must pronounce her under the obligation to return." So that, in his opinion, if the wife had failed in obtaining a separation he must, in the same suit, have admonished her to return to cohabitation. It struck me, at the time this case was cited in argument, that it was not consistent with the doctrine of Lord *Stowell* in other cases, and on looking into the case of *Evans v. Evans (a)*, I find him saying, "It is a mistake to say, as have been said on this occasion, that, in the present suit, I can issue a monition to either party to return. This suit can lead to no such sentence." This seems inconsistent with the *dictum* in *D'Aguilar v. D'Aguilar*. The Court in its search into the cases, has found several which have a bearing on this point. In *Barrett v. Barrett (b)*, it was held, that in a suit where the citation was for divorce by reason of cruelty only, a wife was at liberty to plead acts of adultery subsequent to the citation. The Court has also looked at some old cases ; in *Moore v. Moore* (1722, a note by Dr. *Andrews*), there was a suit by the wife against the husband for a separation by reason of cruelty. Sentence was given in the Court at York against the wife, pronouncing that the cruelty was not proved ; an appeal went to the Delegates, they affirmed the sentence. The husband prayed the Court at York, for a monition to compel the wife to return to cohabitation, and a monition issued ; she refused to return, and was, therefore, excommunicated. In the course of the subsequent proceedings, the wife appeared, and alleged that the

(a) 1 Cons. 120.

(b) 1 Hagg. E. R. 22.

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cruelty, and the husband was ordered to take her home.

There is, however, a distinction between these cases and the present. In this case issue is joined on the fact of the marriage; in other cases both parties agree in affirming the marriage, but join issue on other facts; in the present case the husband denies the marriage; the question is, whether this is so material a distinction as to lead the Court to a different determination from those other cases? I am of opinion that it is not a material distinction, if the libel of the husband had been admitted in this case, the wife might have pleaded a valid marriage, and might have obtained a sentence in favour of it; then, according to the other cases, a monition might have issued to the husband to return to cohabitation. It does not appear to me that there is any material distinction between the cases, for in both views, the husband is before the Court in a matrimonial cause.

I am, therefore, of opinion, that, under these circumstances, the libel now offered, is proper to be admitted. It is alleged that the costs of the former libel have been taxed and paid, that removed a difficulty which the Court felt on a former day.

[The party having been thrice called and not appearing, the Court admitted the libel.]

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of request jointly and severally signed by the Archdeacon of Norwich, and by the chancellor of the Bishop of the diocese of Norwich, and for permission to issue out a decree or citation, conformable to the letters of request, under the seal of this Court, directed to a party named therein. The object is to compel that party to answer to certain articles, and in particular, "For having wilfully and contumaciously refused to make or join, or concur in the making of a sufficient levy, rate, or assessment for providing funds, in order to defray the expense of the necessary repairs of the parish church;"—therefore, it is a case which will be pressed in a criminal form, and the party will be entitled to take every objection to the form and nature of the proceedings,—they being, as I have said, of a novel kind.

This form of proceeding is the only course, which, according to the *Queen's Advocate*, is left open to enforce that,—which undoubtedly it is the duty of the Court to enforce in a proper case—namely, the necessary repairs of a parish church. I am not inclined to shrink from enforcing what is the law of this country, when it is made out that I have authority to enforce it in the mode requested; the Court can have no objection to have this or a *libellous* case brought before it; my doubt arises who with reference to the form of the proceeding be a criminal proceeding, and it must be understood that the Court does not throw out any doubt as to the propriety of the proceedings, but only as to their form.

The letters of request, thus signed, begin stating a special custom by which the parishioners

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going on at the same time—"To be cited to appear before us at a given time and place, to wit, in our Archdeaconry Court, situate or held in the parish church of St. Michael, in the city of Norwich,"—thereby shewing that there is an Archdeaconry Court in Norwich,—“Then and there to answer as to the state of the said parish church in respect of its want of repairs, and to shew cause, if they had or knew any, why a monition should not issue against them, monishing them to do effectually all such repairs to the said church as it stood in need of:”—so that the archdeacon, at the visitation, issues an injunction on the churchwardens and parishioners to repair the church, that injunction is not complied with, and then he directs a citation to issue, calling on them to shew cause why a monition for such purpose should not issue against them. The letters go on to recite,—“That at the return of the citation the churchwardens and principal inhabitants of the parish, the said John Bateman being one of them, personally appeared to such citation, and no cause having been shewn to the contrary, a monition was decreed, and afterwards issued, and was duly served, admonishing the said several parties specially, and all other the parishioners in general to do the necessary repairs to their said parish church, and further monishing the churchwardens to call a vestry meeting of the parishioners of the said parish, in order to the making of a sufficient levy, rate, or assessment for providing the necessary funds; and, lastly, monishing the said principal parishioners, and among them the said John Bateman specially, to be present at or to attend the vestry so to be holden, and

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is, can the Court properly receive them in their present form?

The main point is one of great importance as to the jurisdiction of the Court; in the case of *Butler v. Dolben* (a), a motion of a somewhat similar nature was directed by Sir *G. Lee* to be made in open Court; it was a question of presenting joint letters of request;—certainly not a very usual course, but still cases have occurred where they have been accepted and acted upon, however they were all cases relating to marriages. *Sullivan v. Sullivan* (b) was a marriage case, as was also *Hodges v. Hodges*. The case cited from Sir *G. Lee's* notes, was a marriage case, in that case, the first of the kind of which I am aware, a woman named Dolben had contracted a marriage with a ward of the Court of Chancery; after the marriage, the parties had gone abroad, and subsequently returned to this country. The Lord Chancellor was applied to for the purpose of proceedings being had against her for having married a ward of Chancery without the proper consent of that Court; the father of the minor was anxious to proceed against the woman, to obtain a separation by reason of her adultery. Joint letters of request were sent to the Court of Arches by the commissary of Bucks and the chancellor of the diocese of London, there being a doubt as to which of the two jurisdictions, under the statute of citations, she was subject. The personal residence of the woman was in the Fleet, her last known place of residence was in Bucks. The question in this Court was, whether her residence in the Fleet,

(a) 2 Rep. t. Lee, see pp. 265—312.

(b) 2 Add. 299.

being by compulsion, did constitute a residence in the parish in which the Fleet prison is situate, that is, whether under the Statute of Citations, she should be considered as resident in that parish? If she was to be so considered, no doubt London was the proper diocese. Sir *G. Lee* was of opinion that he might accept the joint letters of request. An appearance was given for the lady under protest, and in a subsequent state of the proceedings it was held, that although her residence in the Fleet was a compulsory residence, that was the proper jurisdiction in which she should be cited. Now in this case there were two separate and distinct jurisdictions, in no way dependent on one another; the chancellor of London could have no jurisdiction in the diocese of Bucks, and the commissary of Bucks could have no jurisdiction in the diocese of London; from which ever jurisdiction the party cited was subject to, an appeal lay to the Court of Arches, there could be no intermediate appeal from the one jurisdiction to the other, there was no appeal *per sultum* from either jurisdiction, the appeal was to this Court instant; moreover the case was a civil proceeding, here it is criminal. According to the general law, the archdeacon has not a jurisdiction entirely independent of the chancellor of the diocese, but an appeal lies from the archdeacon to the chancellor of the diocese, and from him to the Arches Court of Canterbury; this is undoubtedly a very material distinction between the two cases, and the proceedings in this case being criminal, must necessarily be very strictly conducted.

If these two jurisdictions are independent, the

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tacking the name of the one Judge in the letters of request may be mere surplusage, and I might be willing to proceed, but it does not appear on the face of these proceedings, that the Archdeacon of Norwich has a separate jurisdiction, therefore it is not competent for him to sign letters of request to this Court; his is not an exempt jurisdiction. The Chancellor of Norwich no doubt has jurisdiction, and if he was alone proceeding in this case, I should have no doubt whatever, but it is a mere bare possibility whether the archdeacon has an exempt jurisdiction. Why are there joint letters of request? If the one jurisdiction is liable to be controlled by the other, namely, the archdeacon by the bishop.

I do not agree with the *Queen's Advocate* in saying that even if the archdeacon has no separate jurisdiction, and although the proceedings were commenced in his Court, there could still be joint letters of request signed by the archdeacon and the chancellor of the diocese together to this Court, passing over the intermediate right of appeal. A delegated power is given to the chancellor, and it cannot be delegated to this Court.

Unless some very special ground be shewn why this case should proceed in this form, I am unwilling that it should so proceed, because, no doubt, the object is meritorious, namely, to compel repair of this parish church; it may defeat the very object by loading the case at its outset with this preliminary objection.

It has been said that there is no other mode of proceeding, my object is not to withhold the jurisdiction of this Court, but to guard against any question

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ment in the citation, that the church was out of repair ; that a vestry meeting was ever convened, or that any rate was ever proposed, or that Mr. Francis was assessable to such rate, if not, he was a mere intruder or trespasser. The Court is not at liberty to indulge in conjectures on these points, *Cooper v. Wickham* (a). A proceeding by articles is not the proper course in a case of this nature, it should be by monition, followed up, in case of contumacy, by excommunication, *Veley v. Burder* (b), *Fielding v. Standen* (c). “ *Si aliqui, qui tenentur ad reparationem, contribuere, dum possunt, nolunt, vel nimis remissi sunt, tales, monitione præmissa potest ad hujusmodi reparationem compellere* (d).” The citation states that the party has been contumacious, but it does not state that there has been any monition to found the contumacy, and, according to this last passage, a monition must precede excommunication.

The *Queen's Advocate*, *Phillimore*, and *Addams*, *contra*.

The mode of compelling an individual parishioner to contribute to the repairs of the church, is not by excommunication, if the passage cited from *Lyndwood* be correct, for the words apply to the whole parish, they are in the plural, and excommunication is not inflicted on a whole body of parishioners. Individual parishioners may be proceeded against for not joining in making a rate, *Fitzherbert's Reg. Bre.* (e). In this case there is a precise averment that repairs of the church are

(a) 2 Curt. 303—312.

(b) 12 Ad. & Ell. 314.

(c) 2 Curt. 663.

(d) *Lyndwood*, lib. 1, tit. 10, p. 53.(e) *Tit. Cons.* 44, a.

necessary ; in *Cooper v. Wickham* (a), there was no such statement ; moreover, *non constabat*, in that case, that the church had not been repaired between a vestry meeting and the issuing citation. *Greenwood v. Greaves* (b), is a direct authority for this proceeding. See also *Millar v. Palmer* (c).

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SIR HERBERT JENNER FUST.

This case comes before the Court by letters of request from the Chancellor of the Diocese of Norwich. It is a cause of Office, promoted by Mr. Steward, of the city of Norwich, against Mr. Francis, calling upon him to answer to certain articles to be administered to him. The letters of request were accepted by the Court, and in conformity with them, a citation issued, embodying in it the cause of the proceeding ; the citation called upon the party to answer to certain articles, “ touching and concerning his soul’s health, and the lawful correction and reformation of his manners and excesses, particularly in respect of his having wilfully and contumaciously obstructed, or at least refused to make, or join, or concur in the making of a sufficient levy rate or assessment for providing funds in order to defray the expense of the necessary repairs of the parish church (including the chancel, which by the custom of Norwich the parishioners are bound to repair), of the said parish of St. George of Colegate within the said city and diocese of Norwich.”

To this citation an appearance was given ~~and~~ protest, and the protest is set forth in ~~very~~ words in an act on petition,—it is alleged ~~that~~

(a) 4 Hagg. 77.

(b) 2 Curt. 303.

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Mr. Francis is wrongfully and unlawfully cited in the manner and form, and to the effect aforesaid, on the reason that it doth not appear by the said citation that the said John Francis hath been guilty of any offence charged with any ecclesiastical offence cognizable by this or any other Ecclesiastical Court,"—by the said citation it does not appear that the parish church of St. George, Colegate, ever now is in want of any repairs whatever; or that the vestry for making any rate to defray the expense of any such repairs had been duly or at all called upon; or that the said John Francis was ever present at any vestry in the said parish when such rate was proposed or considered; or that he ever took any part whatever in the proceedings of any such vestry—"that it is not competent for any person to interfere with the office of the Judge, or otherwise to prosecute criminally against any one or more individuals of the parishioners or inhabitants of a parish for or on account of the acts, matters, or things charged or alleged against the said John Francis in the said citation, and that he, the said John Francis, is not to appear in the said cause or business to the said Judge, and it concludes with a prayer, that the Judge will pronounce for the protest against Mr. Francis from this suit, and condemn Edward Stewart in costs.

To this it is replied, on behalf of the said John Francis, that, "denying it to be true as alleged, and on the contrary alleging that it does appear by the citation issued, that the said John Francis, returned in this cause, that the said John Francis is charged with an ecclesiastical offence

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Ecclesiastical Court, and that it is a duty from which parishioners cannot relieve themselves, and which they may be compelled to discharge :—how and in what manner, may be matter of some doubt, but I hold the principle to be sufficiently established by what is laid down in the Court of Exchequer Chamber, by Lord Chief Justice *Tindal*, in delivering the judgment of that Court, in the *Braintree case*. His lordship expresses in few words all that is necessary for this Court to consider : speaking of the statute *circumspecte agatis*, he observes, “ upon the construction of this statute no doubts have ever been raised or can exist, but that the Spiritual Court has power and jurisdiction by ecclesiastical censures to compel the churchwardens to perform their duty in relation to the repairs of the church ; to compel the parishioners to perform their duty in providing the means to make such repairs, and after a legal rate has been imposed to compel each individual to contribute the sum assessed upon him.” The Chief Justice does not enter further upon that question, because it was not before the Court; assuming then the duty of the parishioners to be as stated, and further, that it is the undoubted power of the Ecclesiastical Court by censures to compel them to perform their duty, the Court will proceed to consider the circumstances of this case.

The objection arises on the citation, not on the articles, and the first question is, what is necessary to be stated in the citation, in order to compel the party to appear before the Court? The citation must undoubtedly contain an offence of ecclesiastical cognizance ; it must contain the cause of action, the nature of the charge which is imputed to the

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doctrines of general application, whereas, they probably are applied to the circumstances of that individual case; and, therefore, in considering the judgments delivered in this Court, it must be borne in mind, that the actual expressions to be found in them have reference to the particular arguments used in the individual cases; it is necessary, therefore, to see what were the particular circumstances under which the case of *Cooper v. Wickham* was considered.

Now the tenor of the citation in that case was this—calling upon Mr. Cooper, one of the churchwardens of the parish of Shepton Mallett, to appear, &c.—“to answer to certain articles, heads, positions or interrogatories to be objected and ministered to him, touching and concerning his soul’s health, and the lawful correction and reformation of his manners and excesses,”—in what respect? “Touching and concerning his office of churchwarden, and more especially for having at a vestry meeting”—he was therefore specifically called upon to answer to articles touching his office of churchwarden,—“duly holden on the 31st day of January last, to wit, in this present year, 1839, in the said parish, for the purpose of making a church-rate, in pursuance of notice published according to law, voted in favour of a resolution then and there duly moved and seconded, such resolution being in the words following,”—“That this vestry considering church-rates at all times bad in principle and particularly unjust in practice, and quite uncalled for at the present time, resolve to adjourn all further consideration of the subject for which it has been called till this day twelvemonth; and also

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had come before it in the first instance, or if an appearance had been given under protest in the Court below, and that protest had been overruled, it would have reversed that decision, and dismissed the party. But the case came before the Court in a different shape, after the articles had been admitted, and it was in reference both to the citation and to the articles themselves, that the Court expressed itself in words alluded to, as to the necessity of setting forth the charge in the citation, in order that the party might know the charges imputed to him, and might have an opportunity of judging whether they described an offence of ecclesiastical cognizance.

Before I proceed to the articles exhibited in the cause of *Cooper v. Wickham*, I will state, that a meeting of the vestry of the parish of Shepton Mallet had been called in the month of January, 1839, and this vote and these resolutions had passed at that vestry. The citation was not taken out till the 6th of April, and the articles were not given in till June in that year; therefore, as this was a proceeding against Mr. Cooper for the neglect of his office of churchwarden, the Court thought that in the interval of time, that had taken place between the meeting of the vestry and the giving in of the articles, or the return of the citation, the church might have been put in a state of repair. If that were so, and this being a proceeding against him in the office of churchwarden, there was no blame to be imputed to him, and these proceedings in April and June, one by a citation, and the other by articles, were not necessary.

Now the first of the articles contains this aver-

ment, "that previous to and in the month of January, last past, the roof of the nave of the parish church of Shepton Mallett, in the county of Somerset and diocese of Bath and Wells, was in so dilapidated a state that the rain came through the same into the body of the said church to the serious detriment and injury of the fabric, and also of a valuable organ in the said church, and to the great inconvenience of the officiating minister in the said parish church, who on one occasion, on account of the rain so coming therein, was prevented from reading prayers in the reading desk ;—and of the congregation of parishioners and others from time to time assembled in the said parish church."—There was an averment that this church was in a dilapidated state in the month of January, 1839 ; and therefore, that it required to be repaired there could be no doubt. This was an article on which the Court observed, that, standing by itself, it would be proper, because it does aver the necessity of repairs arising from the church being in a state of dilapidation, and it was necessary that a remedy for that inconvenience should be found. But the articles went on in the second place to allege, "that in consequence of the premises mentioned in the next preceding article, a vestry meeting agreeably to a notice in writing, signed in duplicate by Charles Wainwright, and by you, the said Job Cooper, then and now the churchwardens of and for the said parish of Shepton Mallett, was duly holden on the 31st of January, last past, to wit, in the present year 1839, in the vestry room of the said parish church, for the purpose of making a church-rate towards effecting the repairs of the said church,

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and for expenses as necessary for the due administration of Divine service and incident to the office of churchwarden. That the said meeting having adjourned to the school-room, belonging to the National school in the said parish, certain estimates were laid before the said meeting by the said Charles Wainwright,"—that is by the brother churchwarden of Mr. Cooper. "That at that meeting a resolution was then and there moved and seconded respectively by two dissenting ministers; and that notwithstanding the premises you, the said Job Cooper, then and there, in violation of the laws, statutes, canons, and constitutions ecclesiastical of this realm, and of your duty and obligations as churchwarden, and what is fitting and right to be observed in respect thereof,"—that is, in the office of churchwarden, "voted in favour of the aforesaid resolution, and then and there also voted against a church-rate of two-pence in the pound, then and there duly moved and seconded (as an amendment to such resolution respectively,) by the said Charles Wainwright, and by Alfred Gale a parishioner and inhabitant of the said parish." So that the offence charged in the articles is, first, that the parish church was out of repair, and therefore requires to be repaired; consequently it was necessary that a rate should be made for that purpose; that a meeting was called at which the resolution, in the terms stated, was moved and seconded by two dissenting ministers, and Mr. Cooper, the party proceeded against, voted for that resolution, that being in violation of the duty, the obligation, that rested upon him as churchwarden; and also that he voted against a rate of two-pence

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two-pence in the pound ; now the sum which a rate of two-pence in the pound would have raised, was not stated, neither was the rental of the parish stated. The rate of two-pence might have exceeded the 1817., or might have fallen short, therefore, Mr. Cooper might be very well justified in voting against the rate, though it was proposed by his brother churchwarden ; for it might be an excessive rate, with reference to the estimate. Such was the case of *Cooper v. Wickham*, in which the Court expressed itself in the manner observed upon in argument ; the accuracy of Dr. *Curteis's* report I have no reason to impugn ; I have no doubt that these were the expressions made use of by the Court, in delivering judgment ; and I am not inclined to depart from anything there said, with respect to the necessity of setting forth fully the charge against the party ; as I have before said, it is for the purpose of giving the party notice of what he is called on to answer, and that the offence is of ecclesiastical cognizance. In that case, the Court was of opinion that the charge was not sufficiently set forth, nor sufficient to shew, that Mr. Cooper, as churchwarden, in which character he was called to answer, had been guilty of neglect of duty upon the grounds there stated, namely, by voting against a church-rate, as being bad in principle, and voting against the particular rate of two-pence in the pound.

In regard to the necessity of setting forth fully the charge which the party is called to answer, two other cases were adverted to, one before the Court of Delegates,—the case of *Greenwood* and

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In *Cooper v. Wickham*, the decision of the Court was, that the citation did not set forth,—that the articles did not contain,—a charge that the party was called upon to answer in the character of churchwarden; and it did not appear, that there was any want of repair at the time when the citation issued, or that he had been neglectful of his duty in not pressing that repair. In the present case, the cause of offence is this, for “wilfully and contumaciously obstructing, or at least refusing to make, or join, or concur, in the making of a sufficient levy, rate, or assessment, for providing funds in order to defray the expense of the necessary repairs of the parish church,”—what is the Ecclesiastical offence contained in these words?—in the first place, “wilfully and contumaciously obstructing the making of a church-rate,” no such words as these were in, nor was anything of the kind, or of similar import, contained in the citation in *Cooper v. Wickham*; it was simply an averment that he had voted for such and such a resolution,—one a resolution against church-rates generally, the other against the particular rate, which was not shewn to be necessary for the repairs of the church; here it is fully stated, that it is for wilfully and contumaciously obstructing the making of any church-rate. That is the first charge; it is said that a person cannot be contumacious unless there has been a monition issued against him, which has been disobeyed; and perhaps, that is correctly argued,—what then? The words “contumaciously obstructing,” import, that there has been a monition, for if contumacy consists in disobeying a legal order, it follows, from

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Cooper v. Wickham, "That he wilfully and contumaciously obstructed, or at least refused to make, or join, or concur in the making of a sufficient levy," a sufficient rate, so that it was to concur in making "a sufficient levy, rate or assessment for providing funds in order to defray the expense of the necessary repairs of the parish church," so that the citation in fact contained this averment,—that the levy proposed, was a sufficient levy, at least not more than a sufficient rate; and it is to make a sufficient levy, that he is charged, to defray the necessary repairs. There is then an averment that the repairs were necessary for which the rate was to be applied. It is not a proceeding against the party, merely, as was suggested, for voting against a rate when proposed, but against a sufficient levy to defray the necessary repairs.

Every thing is contained in this averment to constitute an offence, "contumaciously obstructing, or refusing to join or concur in making a rate which was necessary to be made for the repairs of the church," so that the repairs were necessary, and if that is shewn then the rate for providing these expenses was necessary.

I am, therefore, of opinion, that this citation does contain what is the charge imputed against the party, and, as I have before stated, it seems to be admitted on all hands, that the Ecclesiastical Court may proceed by ecclesiastical censures to compel the parishioners to provide for the repairs of the church; it follows, as a matter of course, that the proceeding must be, as was stated in the course of the argument, against individual parishioners: for what is the argument in that case with which we are

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case, as we know, there are proceedings against other individuals. The promoter of the suit cannot include them all in one citation, it would be contrary to all practice and all rule to do so. There is, therefore, the necessity for proceeding against them individually, provided the power exists of proceeding by ecclesiastical censures to compel the parishioners to perform their duty in providing means for repairing their church.

Under these circumstances, I am of opinion that I must overrule the protest, and that I may safely overrule the protest without at all deviating from, or in the least degree diminishing the effect of the observations which the Court made in *Cooper v. Wickham*; for I think there is a clear distinction in the two cases. In the one there is no averment of necessity of repairs—the party is proceeded against in the office of churchwarden—it was a mere abstract proposition, that the churchwarden had voted for a certain resolution against a certain rate proposed, it not being known that it was a necessary rate for the purpose to which it was to be applied. Here it is stated in this citation, that the party “wilfully and contumaciously obstructed, or at least refused to make, or join, or concur in the making of a sufficient levy, rate or assessment for providing funds in order to defray the expense of the necessary repairs of the parish church;” containing therefore, in itself, a statement that the church was in need of repair, and that the rate was sufficient for that purpose.

I, therefore, overrule the protest, and assign the party to appear absolutely. I reserve the question of costs until the hearing of the cause.

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ceased was, at the time of his death, possessed of the sum of 40,000*l.* in the English funds.

The *second* Article pleaded the will of the deceased, dated the 22nd of October, 1841, and subscribed by the testator, but not in the presence of any witness.

The *third* pleaded the authenticity of the copy of the said will, which had been brought into the registry, and that the original will remained at Smyrna.

The *fourth* pleaded, that by the laws in force throughout the Ottoman empire, it is declared, that it is not competent for a Turkish subject to make any disposition of his property by will, but that the same shall be divided among his relations according to a fixed standard. That by articles of peace between Great Britain and the Ottoman empire, finally confirmed by the treaty of peace concluded at the Dardanelles (*a*) it is (26 sect.) agreed, “ That in case any Englishman, or other person subject to that nation, or navigating under its flag, shall happen to die in our sacred dominions, our fiscal and other officers shall not, on pretence of its not being known to whom the property belongs, interpose any opposition or violence by taking or seizing the effects that may be found at his death, but they shall be delivered up to such Englishman, whoever he may be, to whom the deceased may have left them by his will. And should he have died intestate, then the property shall be delivered up to the English Consul, or his representative, who may be there present; and in case there be no consul

(*a*) 1809.

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the age of six years, was sent to this country for his education ; he remained in this country about six years, and then returned to Smyrna, where he established a house of business, and continued to reside there until his death in 1842. The *fourth* article of the Allegation pleads, “ That by the laws of the Turkish or Ottoman empire, it is not competent to a Turkish subject to make any will of his property, but that the same is by law to be divided among his relations according to a fixed standard ; that by a treaty between Great Britain and Turkey, it was agreed in the following terms :—‘ That in case any Englishman shall happen to die there, his effects should be delivered up to such person to whom the deceased should have left them, or in case he should die intestate, to the English consul, or otherwise to some person appointed by the English ambassador.’ ” Now when I read this Article, it at once struck me, that if the deceased was domiciled in Turkey, he could make no will at all ; if he was a British subject, he must make a will according to the testamentary law of England. I have been told in argument, that he was neither a Turkish nor a British subject in reference to the law, either of Turkey or of England, but that it is a case where a party by the *jus gentium*, may make such a will. If the deceased is an Englishman, he may, although domiciled in Turkey, make an English will under this treaty, and if so, must not this will be considered as the will of an English subject, and then is it not invalid ? If he is a Turkish subject, I have it pleaded, indeed recognised by the treaty, that no Turkish subject can make a will. I may, perhaps, here mention, that if I am asked to grant

administration to the deceased, I must have it ascertained who is, by the law of Turkey, entitled to the administration. I reject the Allegation for probate of this paper.

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This was a suit commenced by Lord Graves against Louise Lady Graves, his wife, for a separation by reason of her adultery; a libel on the part of Lord Graves had been admitted.

In a cause of separation by reason of adultery, it is not competent for a husband in an initiatory libel, to plead adultery, nuptial intercourse, or the wife; marriage is a contract, nature of the error of the fact; the pleasure of the party is not the ground of the error.

An allegation was now offered on behalf of Lady Graves, pleading.

First Article:—That the party proponent, formerly Louise Malline, spinster, was many years ago in the service of Sophia Lady Graves (wife of the said Lord Graves) since deceased, and whilst in such service *she was seduced by the said Lord Graves, and with whom she, at his urgent and repeated solicitations, for some time lived and co-*

the husband, cannot be pleaded, it involves an issue which this Court cannot try. It is not competent for a husband to plead the fact of her cohabitation, when single, with the husband, in order to excuse his want of proper vigilance on his part over her subsequent moral conduct.

It is competent to a wife to plead, that the husband introduced her to another woman; more especially when the husband is counter-charged with having intercourse with that party.

Minute specification in pleading acts of adultery, depends on the opportunity of the commission of the offence; if they have been frequent (e. g. during a journey) it is not necessary to allege particular dates and times. Secus, if such opportunities are rare occurrences.

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habited, and during such their cohabitation she gave birth to a child (being the child mentioned in the certificate annexed to the libel admitted in this cause on behalf of Lord Graves).

Second Article :—That whilst the party proponent and Lord Graves lived and cohabited together, Lord Graves became acquainted with Jean Emile D—, a musician at the Academy Royal de Musique, and also with Eliza V—, an actress on the French stage, but then living with, or as the mistress of Mr. —, and introduced both such persons to the party proponent, to whom they had previously been perfect strangers.

The *sixteenth* :—That some time prior to his separation from the party proponent, but when in particular is unknown, Lord Graves formed an adulterous intercourse with Eliza V—. That Eliza V— having called to see the party proponent, who had been then recently confined one day in November, 1840. [The commission of an act of adultery was then charged].

The *seventeenth Article* :—That Lord Graves, soon after his separation from the party proponent, went to England, but, after a short stay there, returned to Paris, and there, as a guest or otherwise, took up his residence in a suit of apartments occupied by Mr. —, and Eliza V. ; that from such time until on or about the 1st of April, 1841, (except for a short interval, during which he again went to England), Lord Graves continued to be resident at the said apartments, and during the whole of such time he and Eliza V— *habitually committed adultery*.

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tion go only to certain parts of it:—the first Article pleads—“That the party proponent was in the service of Lady Graves, (the first wife of Lord Graves), and whilst in such service was seduced by Lord Graves, and lived and cohabited with him, and during that time gave birth to a child.”

In enforcing the objections to this Article, reference has been made to the doctrine of this Court as to antenuptial incontinence; a doctrine which, perhaps, has never been thoroughly considered in all the different points of view, in which, according to varied circumstances, it may arise. I take it to be the rule, that the party commencing a suit of this nature—be it husband or be it wife—has no right to plead in the original libel, “that the other party was in the habit of leading a lewd and licentious life previous to the marriage,” by entering into the tie of marriage, the party has given a final pardon to all antenuptial errors; but, it is by no means clear, that this doctrine cannot be extended beyond the limit, that it may not be competent to the party commencing the suit, in the event of peculiar circumstances arising in the course of the suit, to plead and prove antenuptial incontinence. I well remember a case which occurred before Sir *J. Nicholl*, in which antenuptial incontinence was pleaded in the first instance, and was directed to be struck out, but Sir *J. Nicholl* said, “If hereafter the wife should by way of defence think fit to allege or prefer a charge of neglect or collusion, the husband may introduce the antenuptial incontinence by way of reply to the defence,” the name of the

case to which I allude, is *John v. John (a)*. In the present case, where a wife is defending herself against a charge of adultery, and where consequently she may plead in defence direct collusion or counter-adultery, it appears to me, that circumstances which occurred before the marriage are not so obliterated by the marriage as to prevent a wife availing herself of them to support her defence, although she could not have done so if to substantiate an original charge. If the case rested here I should be of this opinion as to the general admissibility of these charges, but it appears to me, that this case is taken out of the general rule by reason of one of the exhibits annexed to the original libel, by which the fact of antenuptial incontinence is proved by Lord Graves himself, the exhibit proves that he had cohabited with Lady Graves before their marriage. If, by the law of France, it is necessary to insert in the marriage certificate the fact of the birth of this child before the marriage, Lord Graves being under the necessity of producing the certificate, must take the consequences arising out of it.

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I have some difficulty as to that part of the Article which pleads in express terms, "That the party when a spinster was seduced by Lord Graves," because, in such case I may have to try a question of seduction, and that too, after a lapse of ten years; there is a further difficulty, if the party is to be allowed to establish this charge, the husband must have leave to counter-plead it. I think it will be better to reform the Article by stating it thus, "that

(a) Unreported

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whilst in such service, to wit, in the year 1833, she cohabited with Lord Graves, and continued to do so during the life of Lady Graves," this will prevent the fact of seduction being given in evidence. I felt great difficulty in dealing with this point in the case of *Dillon v. Dillon* (a), a case much distinguished from this in these respects,—the time which had elapsed between the marriage and the suit was much less (about fourteen months), and the fact came out on the cross-examination of Dr. Dillon's own witness, who proved, that Dr. Dillon had himself admitted the fact to him, the witness.

The objection to the second Article is this, that it pleads Madame V—— to be the kept mistress of ——, and it is said, this may introduce a question of difficulty, as the statement may be counter-pleaded that she is, in fact, the wife of ——; but as the gist of all the remaining articles goes to prove cohabitation between this lady and —— it is of no importance, if she be his wife, at what time she became or began to be called so. The only question is, whether an article of this nature is to be admitted. In *Harris v. Harris* (b), I admitted such an averment; I well remember, that case created much anxiety in my mind at the time, but I have upon consideration felt satisfied that I did rightly in admitting it; it would go to sap the foundation of all morality, if a husband might introduce to his wife persons of bad character, and when she followed the example

(a) *Ante*, p. 90.

(b) 1 Hagg. 351.

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With regard to the eighteenth Article, I think it should be stated how the parties were seen in the situation described.

Addams. I have no objection to insert this.

CURIA.—Be it so—with these alterations I admit the allegation.

[This case was carried to the Arches by appeal. On the 17th of February, 1843, the Dean of the Arches affirmed the decision of the Court below and remitted the cause.]

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side of the deceased, and subscribed his name thereto, Mrs. Coape, standing beside him at the time, said, pointing to her name signed at the bottom of the paper, "There is my signature you see, you had better place yours underneath."

On the 7th of November, 1842, the Court was moved to admit this paper (A) to probate, the Court rejected the motion, and directed the paper to be propounded. An allegation was given in by the executor, Mr. Moore, propounding the paper, and was opposed by Mr. King the other executor and residuary legatee.

R. Phillimore opposed the admission of this Allegation.

The question which arises, under the 9th section of the 1 Vict. c. 26, is, can a witness subscribe by acknowledging a signature, made in the presence of the testator, but not in the presence of the testator and another witness? The Court has already put a construction on this section as regards this case *In re Allen*(a), *In re Simmonds*(b). There is a distinction between the 9th section of the 1 Vict. c. 26, and the 5th section of the Statute of Frauds, in the former, when speaking of the subscribing by the witnesses, an additional imperative is used, the word "shall" is auxiliary to the strict requisite of the witnesses subscribing in the presence of the testator, after the testator has first signed in their joint presence. In *Risley v. Temple*(c) the exact point was raised under the Statute of Frauds, but does not appear to have been decided. The

(a) 2 Curt. 331.

(b) *Ante*, p. 79, and see *Ilott v. Genge*, *ante*, p. 160. (c) *Skin*. 106.

Legislature, by affirming, in the 9th section of the 1 Vict. that the testator may acknowledge his signature, have virtually negatived the right of the witnesses to acknowledge their subscriptions. He also cited *Roberts on the Statute of Frauds* p. 382.

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H. I. Nicholl, in support of the Allegation.

The cases of *In re Allen* and *In re Simmonds* are materially distinguished from this case; in both those cases, the testator had signed his name in the presence of one witness, and had afterwards acknowledged his signature in the presence of that witness, and of a second witness; but in both instances, when the signature was acknowledged in the presence of the two witnesses, the animus attestandi was wanting as regarded the first witness; physically speaking, the signature of the testator was acknowledged in the presence of two witnesses present at the same time, but in legal consideration the first witness was not present. *M' Craw v. Gentry* (a).

The common law recognises three modes of signing, first, actual signature; second, signature by mark; third, acknowledgment of a signature: the complete validity of the third mode is established by *Grayson v. Atkinson* (b), therefore, to have an acknowledged signature deemed equivalent to an actual signature is a right of common law. The statute law, when, in the exercise of its despotic power over the common law, it enjoins the observance of additional ceremonies in the mode of

(a) 3 Camp. 232.

(b) 2 Ves. senr. 456.

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executing legal instruments, always leaves to the common law the privilege of complying with such ceremonies according to its own fashion. *Vin. Ab.* (tit. Stat. vol. 19, p. 512, pl. 12, 13, 14). Common law rights, and amongst them would be that of performing any ceremonies with regard to the execution of legal instruments after the fashion enjoined by the common law, are never to be taken away without negative words express or implied (*a*). Statutes restrictive of the common law are to be construed strictly in favour of the common law; and it was so adjudged, as regarded the Statute of Wills (*b*). So the Statute of Frauds (*c*) was held to be restrictive of the common law, *Ash v. Abdy* (*d*). This statute imposed the necessity of every will of real estate being *signed* by the devisor, it was held, that this ceremony might be complied with in any one of the three common law modes of signing. In *Baker v. Dening* (*e*) a will signed by a mark was held good. Signing by acknowledgment of the signature of the devisor was established in *Grayson v. Atkinson* (*f*). Moreover, every will was to be subscribed in the presence of the devisor, by three or more witnesses; here again it was held, that the ceremony of subscribing might be fulfilled by the two first of the three common law modes of signing. *Harrison v. Harrison* (*g*), *Addy v. Grix* (*h*). The third mode of signing, namely, acknowledging a subscription, could scarcely arise under the Statute

(*a*) 2nd Instit. 200. See 3 & 4 Wm. 4, c. 106, s. 3.

(*b*) 32nd Hen. 8, c. 1. 34 Hen. 8, c. 5. Co. Litt. 115, A.

(*c*) 29th Car. 2, c. 3.

(*f*) 2 Ves. senr. 456.

(*d*) 3 Swans. 660.

(*g*) 8 Ves. 185.

(*e*) 8 Ad. & Ell. 94.

(*h*) *Ib.* 504.

of Frauds, inasmuch, as it was early decided, that the simultaneous presence of the three witnesses was not necessary; a witness, who must be present when the devisor complied with the requisite of "signing," would, for the sake of convenience, at once subscribe in the presence of the devisor, and, having done so, he could not confer any additional validity on his subscription, by subsequently acknowledging it in the presence of the devisor and other witnesses. How stands the point on principle? The common law required the party from whom an instrument moved to sign his name to it in the presence of a witness, but it did not require the attesting witness to subscribe that instrument in the presence of the party signing; if then, where the rule of the common law has required signature in the actual presence, it allows, as an equivalent, the acknowledgment of a signature, *a fortiori* would it be allowed in a case where signature in the actual presence would not, but for the statute, be required. The statute of 1 Vict., is to be construed by precisely the same rules as have governed the construction of the Statutes of Wills and of Frauds; if then, in principle, the latter statute allowed an acknowledged signature to be equivalent to an actual signature, is that common law right taken away by the 1 Vict.—by negative words, express or implied? By express words undoubtedly it is not; it is contended, that the words which affirm "that the devisor may acknowledge his signature" impliedly negative the right of the witnesses to acknowledge their subscriptions. The statute of 1 Vict. is an amending Act, to arrive at a proper construction of its 9th section, the language of that

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clause must be construed by reference to the already interpreted language of the corresponding section (5th) of the Statute of Frauds. One interpretation on this last section is, that the word "*signed*" may be satisfied, although the attesting witnesses did not see the deviser actually sign, provided it be shewn *aliunde*, that his signature was actually existent on the face of the will at the time when the witnesses subscribed. *White v. the Trustees of the British Museum* (a). The 9th section of the 1 Vict. was clearly intended to cure the mischief of this decision, which was a virtual repeal of the whole scope of the 5th section of the Statute of Frauds. The 9th section of the 1 Vict. provides, "That every will shall be signed by the testator at the foot or end thereof"—if the clause had stopped here, there would have been no need of any witnesses to a will; it goes on, "And such signature shall be made by the testator in the presence of two witnesses present at the same time,"—that is, such will shall be "signed" in the presence of two witnesses, the expression "such signature shall be made" being used instead of "such will shall be signed," in order to accommodate the language to a second alternative mode of signing, namely, "or (that is, such signature) shall be acknowledged in the presence of two witnesses, &c." The *British Museum* case having established, that a will may be "signed" in the presence of the witnesses, without their actually seeing the signature of the testator, that decision must govern the first alternative mode of signing under the 9th section of the 1 Vict., but

(a) 6 Bing. 310.

the Legislature never could mean, that the testator should sign, and yet the witnesses not see his actual signature, because, the second alternative mode of signing is by the testator "acknowledging his signature," in which case the actual signature must be seen. Then has the Legislature excluded the interpretation, put on the word "sign" under the Statute of Frauds, by express or implied negative? Certainly not by express, but by implied negative they have, namely, by the deducing, from the words of the second alternative mode of signing, a negative by implication, that a will shall not be signed according to the first alternative mode, unless the witnesses actually see the signature. Then as, according to the rules of construction, the same words are not susceptible of a double meaning, when one implied negative has been drawn from them, a second cannot be deduced, and then it follows, that there is no negative by implication to take from the witnesses the common law privilege of subscribing by acknowledging their subscriptions. If the Court has any doubt on which side to employ the negative implication, the intention of the Legislature ought to determine it, 4 *Instit.* 330; such intention may sometimes be collected from "foreign circumstances," *Vin. Ab.*, vol. 19, p. 512, pl. 81. The intention of the Legislature is made clear by the Report of the Real Property Commissioners on the subject of Wills. The Commissioners say, "We, therefore, propose that every will should be signed by the testator in the presence of, or the signature be acknowledged to two witnesses present at one time, and that they should subscribe their names in the presence of

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each other, or that *one having signed first* should acknowledge his signature and be present when the attestation is signed by the other."

R. Phillimore, in reply.

The portion of the Statute of Frauds relating to wills was not restrictive of the common law, for there could be no will of real property without the statute: the common law not allowing of wills of real estate, *Co. Litt.* 111, B.

SIR HERBERT JENNER FUST.

The question before the Court is one of great importance with regard to the construction of the Will Act (1 Vict. c. 26). It turns upon the due execution of a paper bequeathing personal property, which is now regulated by the same law as regulates the disposition of real property. The duty imposed upon the Court is to find its way to a due and proper construction of the whole of the Act; not of one single isolated clause, but of the entire intention of the Legislature in passing the Act. This case must form a leading case of its class; two other cases, of a similar nature, have been brought before the Court, but only on *ex parte* motion, unfortunately they were cases, where the property involved in the decision was so small, as to render them unable to bear the expense of litigating the point. As far as I am able to judge, the present case differs in some respects from both those cases. In the case of *Allen*(*a*), the paper was attested by the

(*a*) 2 Curt. 331.

one witness alone present on one day, the deceased having then signed it in her presence; on a subsequent day it was signed in the presence of a second witness, and attested by that witness in the presence of the first, but the first witness was not called on to attest the second execution. The Court was of opinion that the execution was not sufficient. The other case of *In re Simmonds* (a) was very similar. In this case, as has been observed, there is this material distinction; the deceased having in the first instance signed the paper in the presence of his sister alone, does on a subsequent day acknowledge his signature in the presence of his sister, and his sister pointed out her signature to the second witness, but I do not understand, that the deceased desired her to re-attest the acknowledgment of his signature. I admit all that has been said as to the construction of statutes, and the interpretation put upon the Statute of Frauds as to signing by the testator, but is the same interpretation applicable to the subscription of the witnesses? It has been argued, under the present statute, as against the admission of this allegation, that although this might have been a good subscription under the Statute of Frauds, it is not sufficient under the altered language of the present Act; on the other side, it has been said, that a construction is to be put on this Act the same as if on the Statute of Frauds; but it must be remembered, that the doubts, expressed by Judges of Courts of law and equity on the Statute of Frauds, led to the introduction of the present Act. It has been well said,

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that the 1 Vict. c. 26, is not an original Act, but an Act to amend a former law; so it is,—it is an Act to amend a former law, for removing all doubts whatever existing with regard to that law, and I find in the 9th section of the new Act, a considerable departure from the language of the corresponding section (5th) of the Statute of Frauds. The language of the 9th section of 1 Vict. is expressly prohibitory, “No will shall be valid unless it be in writing, and signed at the foot or end thereof,”—clearly thereby intending to remove all doubts, in regard to the construction of the Statute of Frauds, as to signing by putting the testator’s name at the beginning of the will;—“and such signature shall be made or acknowledged by the testator,”—it had been formerly doubted, under the Statute of Frauds, whether an acknowledgment of the signature was sufficient, whether the will must not be actually signed in the presence of the witnesses; here again, all doubt is removed by the present section. Under the Statute of Frauds it had been held, that the witnesses need not be all present at the same time, the signature might be acknowledged to the three or more witnesses at different times;—again, by the present Act, all doubt on that point is removed, the witnesses must be present “at the same time.” Now when I clearly find, that the object of this Act is to remove every possible doubt,—thereby taking away all latitude and discretion in its interpretation,—and that it expressly provides that the two witnesses, who *are to be present at the same time*, shall attest and subscribe, can I hold that the one may attest and subscribe on one day, and acknowledge his or her

signature on a subsequent day? I am inclined to think that the Act is not complied with, unless *both witnesses* shall attest and subscribe *after* the testator's signature shall have been made and acknowledge to them when *both* are actually present at the same time. If the one witness has previously subscribed the paper, and merely points out her signature when the testator acknowledges his signature in her presence, and in that of the other witness which latter witness alone then subscribes, that I hold not sufficient; I have no explanation why the first witness did not re-subscribe. The Act says the testator may *acknowledge* his signature, but does not say that the witnesses may acknowledge their subscriptions. I reject the allegation.

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Dec. 17th.

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against
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CONSISTORY COURT OF LONDON,
AND
ARCHES COURT OF CANTERBURY.

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VELEY and JOSLIN against GOSLING.

1843.

March 25th.

In the year 1836, the parish church of Braintree, in the county of Essex, and in the diocese of London, being considerably out of repair, in the month of December in that year, the parishioners were duly convened in vestry for the purpose of making a church-rate. A rate having been

The parish church of Braintree being very much out of repair, a motion issued from the Consistory Court of London, commanding the churchwardens to summon a

vestry for a specified day and hour, and ordering the parishioners then to attend and make a church-rate. A vestry having been convened, a survey and estimate of the repairs and the expenses was produced, and no objection made to either. A rate having been proposed and seconded, an amendment (in effect) "That no rate be granted," was moved and seconded, and on a shew of hands, was carried. The majority of the parishioners who had negatived the granting a rate having quitted the vestry, the churchwardens and the minority continued to remain in vestry, and re-proposed and carried the necessary rate. Held, by the Dean of the Arches, reversing the decision of the Chancellor of London, that such rate was a legal and valid church-rate.

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moved and seconded, an amendment was moved, seconded, and carried to the following effect,—
“ Resolved, that it appears to this meeting, that the existing law which authorizes churchwardens to convene a parish meeting for the purpose of levying a church-rate does also recognise what is called the voluntary principle, to this extent, that by it no church-rate can be laid but by the free consent of the majority of the parishioners duly assembled in vestry to determine upon it; that the parishioners of Braintree are fully prepared to vindicate this redeeming feature of the law as it now stands, by freely exercising the just rights that the law secures to them, and determining for themselves, whether a church-rate shall now be laid or not; that having accordingly well considered the proposition to levy a church-rate on the present occasion, and the principles involved in that proposition, it is their matured conviction, that so long as the parochial churches are exclusively devoted to the use of the established sect, all expenses of repairs should be defrayed out of the ample revenues of that richly endowed sect, or if there be no ecclesiastical funds available for such purposes, that all expenses of repairs should be defrayed by the voluntary contributions of those who exclusively enjoy the use of the buildings; and, finally, that the consideration of a church-rate be postponed to this day twelve months.” In consequence of this resolution, the church remained unrepaired.

On the 22nd of June, 1837, the vicar, churchwardens, and several of the parishioners met together in the vestry-room of the parish, pursuant to a public notice previously and duly given, for the purpose of making and granting a rate for the

repairs of the church, and for defraying the expenses necessarily incidental to the office of churchwarden. At this meeting the vicar, the Rev. Bernard Scale, took the chair, *ex officio*, and the churchwardens, Messrs. Veley and Joslin, produced to the meeting a survey of the repairs needed, and an estimate of the expense thereof, which survey and estimate had been made by a party of competent skill; the estimate for the repairs amounted to 508*l.* 12*s.*, in addition to which, was a sum of 23*l.* 18*s.* for the expenses of executing the office of churchwardens. No objection having been made to this survey or estimate by any person present, it was proposed and seconded that a rate of 3*s.* in the pound should be granted and made, in order to raise the sum of 532*l.* 10*s.*, whereupon an amendment was moved and seconded to the following effect:—"That as little more than six months has elapsed since the parishioners of this parish in vestry assembled, resolved, by a large majority, that the consideration of the church-rate be adjourned for twelve months; the churchwardens have shewn themselves to be greatly wanting in that respect, to the parishioners, as a body, which is due to them from every parochial officer, in assembling the parish again to agitate the question of church-rate before the expiration of the time to which the consideration of that question had been postponed, and that this meeting cannot but deeply regret that the clergyman of the parish should have given his sanction to a proceeding at once so frivolous and vexatious as that which now call this numerous assembly of rate-payers from their several occupations; that, thus conveying to the vicar of the

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parish, and to the churchwardens, the expression of their grave disapprobation for the uncalled for and improper agitation of the parish, this meeting will give to the demand of the churchwardens no other answer than that which they have already within six months received, and which will be found on the minutes of the vestry, signed by the vicar as chairman (the resolution of December),—‘resolved, that the consideration of a church-rate be postponed to this day twelve months.’”

A shew of hands was taken upon this amendment, and the chairman declared the amendment to be carried; a poll was thereupon demanded, and taken, at the final close of which on the 6th of June, the number of votes were found to be two hundred and seven, for the amendment, and seventy against it; the amendment was thereupon declared by the chairman to be carried, and the meeting was dissolved.

On the 10th of June, Messrs. Veley and Joslin met together, and privately, without any previous notice to the parishioners, or summoning any vestry for the purpose, did of themselves rate and tax the inhabitants and parishioners of the parish for the necessary repairs of the church, and the other expenses incidental to the office of churchwarden, at the rate of three shillings in the pound on the annual value of the rateable lands within the parish, in order to raise the sum of 488*l.* 10*s.* 4*d.* in part of the estimated amount of the repairs of the parish church, and for the other incidental expenses.

Mr. Burder, an inhabitant of the parish, having been assessed to this rate in the sum of 37*l.* 18*s.* 2*d.*, and having refused to pay the same, was duly cited

to appear in the Consistorial Court of London in a cause of subtraction of church-rate. [See the proceedings, ante Vol. 1, p. 372.]

The Judge of that Court having, on the authority of a case of *Gaudern v. Selby* (a), admitted a libel in the cause, a writ of prohibition was moved for in the Court of Queen's Bench, and on the 1st of May, 1840, Lord Chief Justice *Denham* delivered the opinion of that Court, pronouncing the rate in question to be illegal, and affirming the jurisdiction of that Court to prohibit in the matter (b). From this decision a writ of error was brought in the Exchequer Chamber, and, after the case had been very fully argued, Lord Chief Justice *Tindal*, on the 8th of February, 1841, delivered the unanimous opinion of the Judges who sat in error, whereby they affirmed the decision of the Court below. (c)

The judgment of the Exchequer Chamber having contained many expressions affirming the common law obligation of the parishioners to repair their churches, and the church of Braintree becoming more and more dilapidated, in consequence of no repairs being done to it, and Messrs. Veley and Joslin having, in the year 1841, again been elected the churchwardens of this parish, the following measures which are fully stated in the libel given in by the churchwardens, in the present suit of subtraction of church-rate, promoted by them against Mr. Gosling a parishioner, were adopted by them and by several of the parishioners, in order to make a church-rate.

The libel in question pleaded, in the *first* Article,—that the parish church of Braintree had

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(a) 1 Curt. 394. (b) 12 Ad. & Ell. 233. (c) 12 Ad. & Ell. 265.

1842. been for some time past, and now is, in a dilapi-
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rate has been made for such repairs since March,
1834, and that the parishioners, from time to time,
have refused to make any rate for the necessary
repairs. That a rate had been made on the 10th
of June, 1837 ; that proceedings had been com-
menced in the Consistory Court of London, to en-
force that rate, and that that Court had been pro-
hibited from proceeding in the matter.

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The *second* Article pleaded,—that on the 13th of May, 1841, a vestry meeting was duly called and assembled, for the purpose of making and granting a rate for the repair of the church, and for other incidental expenses, but that the majority of the parishioners there assembled had refused to grant a rate ; that the church still continued in urgent need of repair ; that the churchwardens had no funds, in hand to effect the same ; that a survey and estimate of the repairs necessary to be done, and also an estimate of the other necessary expenses, incident to the office of churchwarden, in and for the parish, for the current year, were submitted to the parishioners then and there assembled.

The *third* Article pleaded,—That on the 11th of June in the same year, an application was made to the Consistory Court of London, grounded on an affidavit of the Rev. Bernard Scale, the vicar of the parish, for a decree against the churchwardens and parishioners of Braintree, to shew cause why a monition should not issue against them, the churchwardens, calling on them to provide for the necessary repairs of the church, and the necessaries for the decent celebration of Divine Service, and to call

a vestry meeting for that purpose. (a) That the monition was returned into Court, and an appearance thereto given on behalf of the churchwardens, who submitted themselves to the lawful orders of the Court; but no appearance was given on behalf of the other parishioners; that, no cause being shewn, according to the intimation of that decree, a monition issued, directed to the churchwardens, commanding them to call a vestry meeting, and ordering the parishioners to assemble for the purpose of making the rate.

The *fourth* Article pleaded,—That the monition was duly served; that a vestry meeting was summoned by the churchwardens, and took place on the 15th of July, 1841: that at that meeting, the vicar was in the chair; that the parishioners and inhabitants attended in large numbers, and the meeting was adjourned into the body of the church; that a survey and estimate of the repairs necessary to be immediately done to the parish church, and of the probable expenses thereof, were laid before the vestry; that in the opinion of the persons by whom they were made, the sum of 713*l.* was requisite for the repair of the church, and 20*l.* 6*s.* for the incidental expenses, in all 733*l.* 6*s.* That no dispute arose, and no objection was made, either to the necessity of the repairs, or to the amount of the estimate; that the parishioners, being in vestry assembled, an assessment was proposed of 2*s.* in the pound, which was duly seconded; that a long amendment was proposed by a parishioner, which was seconded, which it is not

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(a) See *Fielding v. Standen*, 2 Curt. 663, for a similar decree and proceedings.

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“that this vestry feels bound by the highest obligations of social justice and religious principle, not to grant a rate, and, accordingly, that no rate be made.” That a shew of hands was taken, and the amendment found to be carried by a large majority, but that no poll was demanded.

The *Fifth* Article pleaded,—That whilst the parishioners still continued in vestry assembled the question was then and there put, “Whether any other amendment was proposed or any other proposition as to the amount of the rate proposed to be made.” That no affirmative answer was given to such question, nor was any proposition made for discharging the obligation of the parishioners of repairing their parish church, and providing necessities for the celebration of Divine Service, and for the other expenses necessarily and legally incident to the office of churchwarden for their year of office. That the majority of the said vestry having by the means aforesaid refused to furnish the churchwardens of the said parish with the necessary funds as aforesaid, the churchwardens and others of the rate-payers and parishioners of the said parish, then and there present in vestry, on the said 15th day of July, in obedience to the aforesaid monition, and in discharge of the obligation cast upon them and the other parishioners of the said parish by the law and custom of this realm, at the said meeting, and whilst the parishioners so continued in vestry assembled, did rate and tax all and every the inhabitants and parishioners of the parish of Braintree liable to contribute to a church-rate for and towards the necessary repair of the church and for and towards providing necessities for the decent celebra-

tion of Divine Service and offices therein, and for and towards the other expenses necessarily and legally incident to the office of churchwarden for the current year, the several sums of money mentioned in the said rate, being a rate or assessment of 2s. in the pound on the annual value of the rateable property within the said parish. That several of the parishioners are excused from paying rates in consequence of their poverty; and that a rate of 2s. in the pound is not more than sufficient to cover the estimated amount for the repairs of the church and the other incidental expenses.

The admission of the libel was opposed.

Addams against the admission.

First, the principle upon which this rate is made is bad.

Secondly, if the rate can be supported upon principle, this is not the proper Court in which to enforce it.

Thirdly, this particular rate is bad.

This rate is founded upon the hint given by the Judges in the Exchequer Chamber, where it was said, "That there is a wide and substantial difference between a rate made by churchwardens alone at a subsequent time after a rate has been refused by a majority of the parishioners, and a rate made by the churchwardens and a minority at the same meeting where the rate has been refused." What is the distinction between a rate made by the churchwardens alone, and the churchwardens and a minority; what will be a sufficient number to constitute a "minority," suppose *all* the parishioners to vote against the rate, would the churchwardens constitute a minority?—that would be to bring the case back to the original question.

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But it has been said, that this rate may be supported by analogy ; and one of the fancied analogies is that of voting at the election of a corporate officer or of a member of Parliament. What is the meaning of "analogy." *Quintilian* (a) in speaking of "*Analogia*," says, "*ejus hæc vis est, ut id quod dubium est, ad aliquid simile, de quo not quæritur, referat: ut incerta certis probet.*" What is the *aliquid simile* between making a church-rate and voting at the election of a corporate officer ? There is no similarity. The first is an imperative duty, a perfect obligation, the second is a privilege or imperfect obligation, the repair of the church is an obligation which every parishioner is bound to fulfil, and which in former times it was highly penal not to fulfil, but the voting at the election of a corporate officer is a franchise of which a party may avail himself or not as he pleases ; there is nothing penal in abstaining from exercising the privilege of voting for a member of Parliament.

A church-rate is a tax, and nothing short of an Act of Parliament can impose a tax on a British subject ; if this rate is good, a minority of rate-payers can impose a tax on the majority.

To pursue the analogy—suppose in the election of a mayor or of the Speaker of the House of Commons, the majority of corporators in the first instance, or the majority of the members in the other case vote for a person ineligible to serve the particular office—they throw away their votes—they lose their privilege of voting ; but suppose that a majority of the House of Commons refuse the supplies and the minority vote them, could the sup-

(a) *Quinct. de Inst. Orat. c. vi. p. 72.*

plies be enforced by taxation? This last appears to me to be the more correct analogy.

It is said that the rate is founded on a common law obligation, and, to support the analogy, in reference to a mandamus, a monition has been taken out, calling on the parishioners to meet at a particular time and place to make the rate, I presume, upon the notion, that if the majority refuse the rate, the minority may then make it. But is the repair of a church a common law obligation, and if so, in what sense? As I submit, in this sense only, as being a portion of the canon law which has been adopted into and incorporated with the common law.

There is a distinction between the *commune jus laicum* and the *commune jus ecclesiasticum* (*Gibson's Codex, Preface*). The obligation upon parishioners to repair their church, is by the *commune jus ecclesiasticum*, it is not a common law obligation in the sense in which that expression is used in reference to the repair of bridges or highways.

PER CURIAM. No doubt the common law of the church has been imported into this country, and has, by custom, become a part of the common law of the land; the difficulty of your argument is this, you say the *commune jus laicum* and *ecclesiasticum* are still distinct, then how comes it that the church is not kept in repair according to the canon law, which threw the burden of the repair on the ecclesiastical revenues and not on the parishioners?

Addams. The Court of Queen's Bench has invariably refused to grant a mandamus to churchwardens or to parishioners to make a church-rate; and the reason invariably assigned is, that it is a

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matter solely of ecclesiastical cognizance. *Rex v. St. Peter's Thetford* (a); *Rex v. St. Margaret's and St. John's Westminster* (b).

If this be a rate founded on a common law obligation, in the sense used by C. J. *Tindal*, this is not the proper jurisdiction in which to enforce it; the proper remedy is by distress; the party may replevy, and the question be tried at law in a simple action of replevin; it has never been held that a Court of law will not entertain the question of a church-rate in that shape; moreover, the party may not replevy; he may allow his goods to be distrained; if so, the matter will be disposed of.

Supposing, however, that a rate made upon the principle involved in the present question could be sustained, still this particular rate is invalid; in the *first place*, it does not appear that the rate proposed by the churchwardens was rejected, the majority never was properly ascertained; a shew of hands was made, but no poll was taken, which latter is the only correct mode of ascertaining the result; a majority of hands does not necessarily prove a majority of votes: certain parties, under the 58 Geo. 3, c. 69, are entitled to a plurality of votes; a numerical minority may have a legal majority of votes (c): Again, the rate purports to include the chancel as well as the nave of the church.

Further, the rate upon the face of it is excessive, it excuses persons assessed to the amount of 1000*l.* per annum, from payment of the rate; it has certainly been said, that the *parishioners* may excuse parties from payment of a rate (d), but it by no means

(a) 5 T. R. 364.

(b) 4 M. & S. 252.

(c) See Rogers's Eccl. Law, p. 879.

(d) *Thompson and Sandford v. Cooper*, 3 Phil. 640, n.

follows that the churchwardens and a minority have that power.

The present libel, therefore, ought to be rejected.

The Queen's Advocate and Haggard, contrà.

It has been argued that the making a church-rate is similar to the imposition of a tax, that is not so;—in the case of a church-rate, the tax is already imposed by the common law; a parishioner, when he enters into the occupation of lands or tenements assessable to a rate, at once binds himself to contribute his quota of the necessary repair of the church; he stands concluded by the common law of the land from voting against a rate. He may shew that the rate is improper or excessive, or that he is unequally assessed, but he cannot refuse a rate when the necessity of it is proved or is unquestioned. A person becoming a member of a corporation, binds himself to vote for persons eligible to hold any corporate offices, and if he votes for an unqualified person, he throws away his vote; *Oldknow v. Wainwright (a)*, because he exercises his franchise in a mode which he had previously bound himself not to do. The analogy is complete between the cases of a parishioner voting against a rate, which he has previously bound himself not to vote against, and a corporator voting for a person whom he has previously bound himself not to vote for.

There is no distinction between the common law of the land, and the common law of the church, save that the law is enforced by different Courts. The case of *Gaudern v. Selby* is a direct authority and precedent for this rate. [*Per Curiam*. The Court of Queen's Bench has completely repudiated

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the authority of that case.] Therefore them, the Court of Error case. [*Per Curiam*. The utm of the Court of Error have said, is to themselves the power of giving point whenever it should occur.] has said that there is a wide and s between the case of *Veley* and *B* case,—the case which now arises

Addams replied.

JUDGMENT.

DR. LUSHINGTON.

Before I proceed to consideration at issue in this case, I dispose of some minor objection to the validity of the rate, and the libel. One of these objections being proposed in vestry, moved, which concluded by a poll was demanded or taken hands the amendment was carried; thereupon the church minority in vestry assembled the rate now in dispute. If poll should have been taken on the ground, that as they are entitled according to the votes, the real number could be otherwise than by a poll, and that, in the mode of voting by majority of individuals or majority of votes, I think, he cannot be sustained, and

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are rated are in such a state of poverty that the rate could not be recovered from them, and that to an extent of no less than 1000*l.* per annum. I presume that this fact is so pleaded, in order to meet any objection, that the rate is excessive ; but whatever was the motive which led to the making of this statement, I do not apprehend that it can vitiate the rate, or render it my duty on that account to reject the libel ; the rate does, as it ought, contain the names of all persons, by law, liable to pay, and both authority and necessity shew that in fact some must be excused on account of poverty : *Prideaux* says (a), " Those who are so poor that they cannot pay poor-rates, ought to be excused from paying church-rates," here the amount in respect of value which it is pleaded cannot be recovered, is doubtless very large, but I cannot say that it may not be shewn that these occupiers must be excused on account of poverty, nor that it is not lawful so to excuse them.

Having disposed of these objections, I now approach the new and important question raised on the admission of this libel. It is necessary first to state a brief summary of the facts. A decree, founded upon an affidavit setting forth that the church was out of repair, and that rates had been refused for several years, issued from this Court,—the libel also setting forth the prohibition which had emanated in the former case from the Court of Queen's Bench—that decree, drawn up in the form sanctioned by the Court of Arches, called upon the churchwardens to shew cause why a motion should not be granted against the churchwardens, to take the proper steps to put the church

(a) *Prideaux*, p. 41, ed. 1805.

into repair, and to call a vestry for a certain day for the purpose of making a rate, and directed the parishioners to attend and make a rate; that decree having been duly served, the churchwardens appeared and declared their readiness to submit themselves to the lawful commands of the Court,—no appearance was given on the part of the parishioners,—a monition was then issued to the churchwardens and parishioners to the effect of the decree, and was served and returned. The vestry met on the 15th of last July, a rate was proposed, an amendment, refusing the rate, was moved, and the amendment being put, on a shew of hands the vicar, who was in the chair, declared the amendment carried: no poll was demanded, all acquiesced in his declaration. The churchwardens, with several other individuals then signed the present rate, which was not again put to the vestry. The defendant in this case is sued for the rate, and the question I have to decide is, whether a rate so made is a valid and legal rate; if it be, the libel must be admitted, if not, it must be rejected; but I wish it to be borne in mind that the validity or invalidity of this particular rate is the sole question which it is my duty to determine, and that all my observations will be directed solely to that end.

I am anxious, as far as lies in my power, to state my opinion and the grounds of it clearly and intelligibly, and I propose therefore to pursue the following course.

To consider *first*, the case of *Gaudern v. Selby*(a), what bearing it has on the present case, what weight it is entitled to; *secondly*, the effect of the judgment of the Court of Queen's Bench in the former

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Braintree case (a) with reference to the present case; *thirdly*, I shall do the same by the judgment of the Court of Exchequer Chamber in that same case; *fourthly*, I shall endeavour to examine the ecclesiastical and common law authorities with respect to the validity of this rate; *fifthly*, I shall apply myself to the doctrines as to the elections of corporate officers, and members of Parliament, which it has been contended ought to govern the present case, and uphold the validity of the rate.

With respect to the case of *Gaudern v. Selby*, I did upon a former occasion, having found that case to be a precedent in the proper sense of that term, yield my own judgment to the superior authority of the Court of Arches, and decided agreeably thereto. During the present argument it has been again urged at the Bar, that I ought to pay the same deference to that case, as I did formerly, but I was at the argument, and am now, most clearly of a contrary opinion; because it appears to me, that not only has the doctrine laid down by that case been repudiated by the Court of Queen's Bench and the Exchequer Chamber, but the Court of Queen's Bench has impugned that case, by reason that no authority or precedent is cited to support it; and that too in very strong terms.

The Court of Queen's Bench, in speaking of that case (b) say, "the question on the effect of this single authority really is neither more nor less than this, can the ecclesiastical Judge make a law? If he only declared one, the sources of his information are equally open to us. If he drew his conclusions from reasoning, we may examine it, and must form our opinions on its force. But, in truth, so im-

(a) 12 Ad. & Ell. 233.

(b) 12 Ad. & Ell. 253.

portant and novel a doctrine was never promulgated with so little effort to conciliate the concurrence of others. The point is not discussed at all : neither reason nor authority is vouched in its behalf. The proceeding wears the appearance of being *ex parte* ; perhaps it had in truth become such by the withdrawal of opposition, which may be well explained by the smallness of the sum and the probable change in the inhabitancy, or the exhaustion of all means and spirit of resistance by a litigation protracted for years. With all respect due to the venerable person from whom this judgment proceeded, we are bound to declare that it does not appear to rest on principle or to be admissible as authority." Discarding therefore, the notion that *Gaudern v. Selby* is any longer a precedent to govern my judgment, I will now consider whether, though no longer an authority for the position attempted to be established by it in the former case, it is an authority to guide me in the present. I have again carefully examined all the proceedings in that cause ; I thought I had done so before, and I am now not disposed to retract any one observation I formerly made on that case. I will not occupy time by referring to all the particulars, but some must be mentioned, that the grounds of my opinion may be made known, and that such opinion may not rest solely on general declaration. I disclaim having at any time laid any stress as to the discrepancy of dates ; for I observed at the hearing of the former case, that any such discrepancy might possibly be explained they might be mere clerical mistakes ; but there are some facts and circumstances connected with that case which, after all the consideration I could bestow upon them, and after having read all that has been

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written in explanation, still appear to me utterly inconsistent with all regularity of proceeding in our Courts, and that beyond all that has ever happened. —[Here the Court went into a minute examination of the case of *Gaudern v. Selby* in the Court below (a) and proceeded]. Having now considered the facts and circumstances of that case in the Court below, I

(a) The following is an abstract of the case of *Gaudern v. Selby* (or rather *Silby*) as taken from the process now remaining in the registry of the Arches Court.

It is there described as a cause of appeal and complaint of nullity, promoted by William Gaudern, a parishioner, inhabitant and landholder within the parish of Easton Maudit, in the county and archdeaconry of Northampton and diocese of Peterborough and province of Canterbury, of the one part, and Samuel Silby, churchwarden of the said parish, of the other part; which was in the first instance a pretended cause of church-rate lately depending in the Consistorial and Episcopal Court of Peterborough.

THE MONITION TO TRANSMIT THE PROCESS was directed to "the worshipful George Watkin, clerk, B. D., surrogate of the reverend and worshipful Spencer Madan, M. A. Vicar-general, Commissary-general, and official principal in spiritual matters, &c., of the Lord Bishop of Peterborough, and also surrogate of the reverend Wm. Brown, D. D., Archdeacon of the archdeaconry of Northampton, lawfully appointed his surrogate or surrogates."

THE RETURN TO THE MONITION.

To the worshipful Wm. Wynne, &c. &c., we, Spencer Madan, Vicar-general, Commissary-general and official principal, &c., of the Lord Bishop of Peterborough, and Wm. Brown, D. D., Archdeacon of the archdeaconry, &c., (after setting forth the monition received from the Dean of the Arches) proceeded, "which said letters monitory being so received, we, the said Spencer Madan, clerk, the Judge aforesaid as by our office in duty bound, do certify and make known that we have caused the registry and public archives of the aforesaid Father in God, his Consistory Court of Peterborough, and of the Archdeaconry of Northampton, to be diligently searched, &c. (dated 21st of January, 1797.)"

THE CITATION.

"William Brown, D. D., Archdeacon of the archdeaconry of Northampton, lawfully constituted, to all, &c., we do hereby charge

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did not attract that attention which under ordinary circumstances, such a case must necessarily have

Fourth Article.—Pleaded that public notice of making the said rate was given in the said parish church, and that William Gaudern was, or might have been, there.

Fifth Article.—Exhibited a copy of the rate. And that in submission and conformity to, or in compliance with, the said rate, most or the greatest part of the *parishioners and persons therein named and rated have paid and satisfied their respective assessments.*

Sixth Article pleaded applications to William Gaudern to pay the sum of 9*l.* 6*s.* 0½*d.* to Samuel Silby, and refusal to pay the same.

Seventh Article pleaded, that Samuel Silby was lawfully and rightly elected, and acting as churchwarden for the said parish.

Eighth Article pleaded, that William Gaudern was, and is of the parish of Easton Maudit, in the county and *archdeaconry* of Northampton and *diocese* of Peterborough aforesaid, and, therefore, *subject to the jurisdiction of this Court.*

The rate exhibited, contained the names of twelve persons whose respective assessments amounted to 31*l.* 6*s.*, the total amount of the rate.

MONITION FOR ANSWERS.

William Brown, clerk, D. D. Archdeacon of the archdeaconry of Northampton, lawfully constituted, to all, &c. ; whereas the Rev. John Watkin, clerk, B. D., our surrogate, lawfully appointed, &c. We, therefore, hereby charge, &c., that you cite or cause to be cited William Gaudern, that he appear before us or our surrogate in the *Consistory Court*, &c.

PERSONAL ANSWERS.

In the Consistory Court of the Lord Bishop of Peterborough and Archdeacon of Northampton.

The personal answer of William Gaudern :—

To the *first* and *second* positions, this respondent answers *and admits that some little repairs might be wanted in the said church*, but cannot say what sum of money has been necessarily laid out and expended on such account ; and admits *that such repairs should be discharged by a proportionable rate on the occupiers of houses and lands within the said parish.*

To the *third Article* admitted the occupation of land of the yearly value of 235*l.*

To the *fourth* and *fifth Articles* denied that any public notice of making the rate had been given, and that the pretended levy,

demand; the allegation given in the Arches Court pleaded, that the rate was made without the

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rate, tax, or assessment, mentioned in the said *fifth* Article, was not made in pursuance of any notice or public vestry held for that purpose, nor is the same signed by the promoter; or if such rate was made at a public vestry by the promoter, *such rate was not approved and allowed by the major part of the inhabitants, or the occupiers of any messuages, lands, or premises in the said parish attending such vestry.*

To the *sixth* Article, admitted applications and refusals.

To the *seventh* Article, admits the same to be true.

The *eighth* and *ninth* Articles, formal answers.

DEPOSITIONS.

Samuel Clifton, a witness examined on the libel, deposed to the ruinous and dilapidated condition of the parish church of Easton Maudit, and that the same wanted repair, but what sum was sufficient to repair the same deponent could not say. That the ruins and defects could not be repaired or provided for without a proportionable assistance from the inhabitants, owners, and occupiers by way of rate. Deposed to notice of the meeting for making the rate being given. To the *fifth* and *sixth* Articles could not depose.

James Hardwick deposed that the repairs of the church could not be done for a less amount than the sum mentioned in the libel. That the repairs could not be done without a proportionable rate on the inhabitants and occupiers. That due notice of making the rate was given. To the *fifth* and *sixth* Articles, could not depose.

William Revitt, deposed, that the parish church was ruinous, dilapidated, and much out of repair, and could not be repaired for a less sum than is set forth in the libel, including other things relating to the office of churchwarden; that deponent went down to the vestry with the promoter Silby; that Gaudern was there also with several others of Easton Maudit, and that Mr. Manning and Mr. Howes, who occupy lands in Easton Maudit, were also present; that deponent believes due and legal notice was given of such vestry, otherwise the two last mentioned persons would not have known of the meeting; that the repairs of the church could not be provided without proportionable assistance from the inhabitants, owners, and occupiers.

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consent of the majority of vestry ; this allegation is signed by Lord *Stowell*, then Sir *William Scott*, and

To the remaining Articles, could not depose.

COMPULSORY TO WITNESSES.

Spencer Madan, M. A., Vicar-general, Commissary-general, and official principal in spiritual matters of the Right Reverend Father in God, Spencer, &c. Whereas the Rev. George Watkin, clerk, our surrogate, &c., rightly and duly proceeding in a certain cause of substraction of a rate, levy, or assessment made for and towards the repairs of the parish church of Easton Maudit in the county and archaiconry of Northampton and diocese of Peterborough, &c.

DEPOSITIONS.

William Brearley deposed, that the church was ruinous and wanted repairs, which could not be done for a less sum than is set forth in the libel, and if they had been done at a less expense, they could not have been done so well. To the *third* Article, he deposed that William Gaudern occupied certain land in the parish, as he verily believes, of the yearly value as set forth in the libel, and he is the more convinced thereof, having served the office of overseer of the poor of Easton Maudit, and having collected a levy after the rate of sixpence in the pound. Mr. Gaudern's share came to 5*l.* 17*s.* 6*d.*, and that he, this deponent, would have paid the surplus then remaining in his hands, which was about 13*l.*, to the said Samuel Silby, as had been usual for many years before, but this deponent was discharged from so doing by the principal charge-bearers.

To the *fourth* Article, after deposing that public notice was given for the inhabitants to meet to make a levy for reimbursing the said Samuel Silby such expenses as he had incurred by virtue of his office ; that deponent was present at the vestry : that William Gaudern was there, as were also Mr. Howes and Mr. Manning ; that the parishioners offered to pay Mr. Silby after the rate of sixpence in the pound, which the said Silby declined accepting.

To the *fifth* and *sixth* Articles, he verily believes the levy or assessment is of the proper handwriting of Silby ; that in conformity thereto, deponent has paid his share of the rate, and he believes several others have done the same.

Christian Pettit (so far as her testimony was conformable to the rules of evidence) deposed to the same general effect as the other witnesses.

its admission was not opposed ; at the hearing of the case neither in the argument nor in the judg-

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SENTENCE.

In the name of God, Amen. We, George Watkin, clerk, B. D., Surrogate of the Rev. and Worshipful Spencer Madan, clerk, M. A., Vicar-general, Commissary-general, and Official Principal in spiritual matters, of, &c., and also Surrogate of the Rev. William Brown, clerk, D. D., Archdeacon of the archdeaconry of Northampton, &c., do pronounce, decree, and declare, That the said Samuel Silby was, at the time of making the rate or assessment, churchwarden, &c. ; and also that, in the year 1793, the parish church of Easton Maudit, standing in need of repair, the said Samuel Silby did, in order for the raising of money to defray the same, call a meeting of the principal parishioners and inhabitants ; and, accordingly, a meeting was held in the vestry, (timely notice thereof being first given, as mentioned in the proceedings in this cause) and *a rate was then agreed on and made accordingly*, in which said rate (it appears to us), that all and every the parishioners, or persons rateable, were rated and taxed to pay after the rate of ninepence in the pound rent for all such houses, lands, and tenements in the parish of Easton Maudit aforesaid, as had customarily obtained. And we pronounce, decree, and declare, that the said rate, so agreed on and made, was and is a good and effectual rate, and rightly and lawfully made. (The sentence then condemned Gaudern in the rate and costs).

From the above abstract of the proceedings, the following irregularities appear :—

The appeal is stated to be from the Consistorial and Episcopal Court of Peterborough.

The monition for process is addressed to George Watkin, as Surrogate of the Chancellor of Peterborough, and also as Surrogate of the Archdeacon of Northampton.

The return to that monition is made by Spencer Madan, Chancellor of the Bishop of Peterborough ; but who says that he has also searched the registry of the archdeaconry of Northampton.

The citation is in the name of Dr. Brown the Archdeacon of Northampton, calling upon Gaudern to appear in the Consistory Court.

The libel is in the name of Spencer Madan, the Chancellor, and of Dr. Brown the Archdeacon—the concluding article plead-

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ment was a single authority cited on one side or the other, and it is clear from the notes both of Dr. *Arnold* and Sir *C. Robinson*, that Sir William Wynne had not the slightest notion that he was considering the present question and consequently could not have decided it; how can I shew deference to an opinion never entertained or expressed? the case was decided on other grounds, Sir *William Wynne* thought he was deciding the question, whether when the vestry had refused a rate, it was competent for the churchwardens alone to make that rate; he said nothing as to its being made in vestry or not; nothing as to the minority having any weight or

ing, that Gaudern was of the parish of Easton Maudit, in the county and Archdeaconry of Northampton, and, therefore, subject to the jurisdiction of this Court. (The libel being headed in two Courts.)

The monition on Gaudern to give in his answers is in the name of Dr. Brown, the Archdeacon, and calls upon the party to appear in the Consistory Court.

The answers of the party are entitled in the Consistory Court of the Bishop of Peterborough, and the Archdeacon of Northampton.

The deposition of Clifton, the first witness, is entitled merely in the Spiritual Court,—he says nothing of the making of the rate.

The deposition of Hardwick is entitled in the Spiritual Court: he is silent as to the making of the rate.

Revett's deposition is headed in the Spiritual Court—he was at the vestry: he says that Gaudern was also present; he is silent as to the making of the rate.

Then there is a compulsory against Brearley, in the name of the Chancellor only; it charges Brearley to appear before him or his Surrogate in the Consistory Court. Brearley's deposition is not entitled in any Court.

The sentence is given by Watkin as the Surrogate of the Vicar-general, and also of the Archdeacon; and it is to be observed, that it states "that a meeting of the principal inhabitants was called; that a meeting was had in the vestry; that a rate was then agreed on, and made accordingly, in which rate the parishioners were taxed at ninepence in the pound;" in effect pronouncing that the rate was made in the usual way by a majority in vestry.

power ; looking therefore to these circumstances, considering that the case of *Gaudern v. Selby* has been expressly disclaimed as an authority by the Court of Court Queen's Bench ; that having lost its original authority it was not set up by the Court of Exchequer Chamber, for that Court having disclaimed giving any opinion upon the present question neither did nor could pronounce any opinion as relating to this question of *Gaudern v. Selby* ; for these reasons I think that the case of *Gaudern v. Selby* is not only not a precedent binding on this Court, but is not even an authority upon the present question. I think it more than probable that the great pressure of business in the Courts in 1799, when Lord *Stowell* had just become Judge, of the Admiralty Court, and there were great arrears, may have been the reason why so little interest was excited, and the case discussed with less research than under other circumstances would probably have been the case.

Proceeding in the course I have prescribed to myself I will now examine the judgment of the Court of Queen's Bench in the former *Braintree case* ;—and first, what was decided by the Court of Queen's Bench, and how far is the decision applicable to the altered circumstances of the case now before me ; I must look to the facts. It was decided, that churchwardens could not after a rate had been refused by a majority of vestry make a valid rate of their own sole authority at a subsequent time. It is clear that accurately speaking that was the sole question before the Court, and in legal strictness the sole question decided ; but it is equally clear that the Court of Queen's Bench did not contemplate, in their judgment at least, the distinction

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taken by the Court of Exchequer Chamber, and consequently they laid no stress upon the fact, that the rate was made by the churchwardens alone out of vestry, and not by the churchwardens and a minority in vestry. The opinion of the Court of Queen's Bench is plain, that Court decided on the principle that a rate made against the consent of a majority of the vestry was illegal. How then shall I deal with that case? not as a precedent fettering and controlling the free exercise of my own opinion upon the present case, for the Court of Exchequer Chamber has told me that in that light it ought not to be so considered; but I apprehend it is my duty to look at the principles on which that judgment is founded, and the whole train of reasoning adopted by the Court of Queen's Bench, and consider, to the best of my power, how far those principles and reasoning are applicable to the present case.

Then first, what are the leading principles of that judgment? and secondly, how far do they apply to the present question. *First*, the law requires clear demonstration, that every tax is lawfully imposed and this doctrine is in strict unison with the principles laid down by Lord *Tenterden*, and the Court of King's Bench in the case of *Cockburn v. Harvey* (a), in which it was decided, that with respect to the church-building acts, a select vestry had not the power of imposing a church-rate, because it was not specifically given to them by the act itself. I advert to that judgment as shewing, that the power of taxation is not to be raised up by inference, but is to be established to demonstration. The next point is a matter on which no lawyer could entertain

(a) 2 Barn. & Ald. 799.

a doubt,—that the power to impose a tax must be derived from Act of Parliament, common law, or immemorial custom,—a third is, that the fact of *no usage* prevailing in support of such power of taxation is evidence against it. A fourth is, that a usage of imposing the same tax in a *different* way is evidence against the power claimed. A fifth, that the absence of any mention of such power in the books of reports is evidence against it. A sixth, that the onus of proving the legality of the power claimed must devolve on those who maintain its legality. Those were the chief general principles which the Court of Queen's Bench applied to the case before them.

I now proceed to examine the same case in the Exchequer Chamber. What did the Judges of that Court do? They agreed with the Court of Queen's Bench in the decision to which that Court had come; they agreed, that there was no custom to warrant a rate *so made*, and no authority for its validity, but they held, that “there was a wide and substantial difference between the churchwardens alone, or the churchwardens and a minority together making a rate at a meeting of the parishioners where the refusal takes place, and the churchwardens possessing the power of rating the parish by themselves at any future time however distant.”

This opinion is plainly and distinctly stated in the words I have read, and it is to this which is stated to be a wide and substantial difference between that case and the present, to which I must devote my best attention: but it is first necessary to note what the Court of Error declared they would not do, and what they reserved. The Court, advertng to the case of *Gaudern v. Selby*, said:

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"We do not enter into the discussion, whether a rate so made by the churchwardens, at the parish meeting, where the parishioners were then met, would have been valid or not; or how far such case may be analogous to that of the members of a corporation aggregate, who, being assembled together for the purpose of choosing an officer of the corporation, the majority protest against, and refuse altogether to proceed to any election; in which case they have been held to throw away their votes, and the minority who have performed their duty by voting, have been held to represent the whole number." Again, on the question of a rate made in vestry, by the churchwardens and a minority, they say: "We give no opinion upon it; we desire to be understood as reserving to ourselves the liberty of forming an opinion whenever the case shall occur."

I conceive that I have now sufficiently discussed the case of *Gaudern v. Selby*, and the cases of *Veley v. Burder* in the Court of Queen's Bench and the Exchequer Chamber, and that I am justified in approaching the present question unfettered by *Gaudern v. Selby*, as a question undecided by the Court of Queen's Bench and Exchequer Chamber, deemed by them as deserving of great consideration, as I conceive, both with reference to the general law, and with regard to its possible analogy to a case of frequent occurrence in corporation law.

Fourth head.

First then, is the present rate valid by ecclesiastical and common law, without resorting to the analogy of corporation law? "There is," says the Court of Exchequer Chamber, "a wide and sub-

stantial difference between a rate made by the churchwardens and minority in vestry, and a rate made by the churchwardens alone, out of vestry." Remembering that I am not speaking with respect to the analogy of corporation law ; it is with reference to other legal considerations most important to weigh, and ascertain in what that *wide and substantial difference* consists ; for, upon the existence of that distinction must, so far as this view extends, depend the applicability of a decision, opposite to that which the Courts of common law applied to the former case. Now, between the two cases there is one important and substantial difference, namely, the time when the rate was made ; whether made in the vestry immediately after the refusal of a majority of the vestry, or at a subsequent period by the churchwardens alone ; for it is obvious that if valid, when not made in vestry, it would be impossible to fix any period short of the whole incumbency of the churchwardens, within which it must be made ; there would be nothing to conclude the time,—a month, six months, or even ten,—and the effect might be, that the churchwardens, by postponing making the rate, might make one upon the consideration of subsequent circumstances, which most, though not all, would agree ought to be submitted, in the first instance, to the vestry. It is true, indeed, that this difference would be less important, if the doctrine that a vestry is purely ministerial, should be adopted to its full extent ; for if the churchwardens are the sole judges, in the first instance, of what are essential repairs, and the mode of making them, and the vestry are bound to raise the money, it would matter little whether the

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rate were made by the vestry, or by the churchwardens and minority in vestry, or by the churchwardens afterwards; but upon the supposition that the vestry have some discretion to exercise, the distinction is not unimportant.

The next point of difference is, that where the rate is made by the churchwardens, in vestry, there may be a minority; if made out of vestry, it must be the act of the churchwardens alone. I cannot, after much reflection, perceive that this is a distinction of any essential importance, for I cannot understand how, *in this view* of the case, the minority can confer any legality upon the act, which would not equally attach upon it if done by the churchwardens alone. The minority may vary from approaching close to a moiety of the vestry, down to a single individual. Upon this difference I cannot rely,—and, save what I have already noticed, other difference between the case decided and the present case, I can find none.

The first point I have to consider then, is, whether any authorities in common law or ecclesiastical law so apply to the present case, thus distinguished, as to render this rate valid, though the former rate was illegal. There is, however, one peculiar circumstance attending the making the present rate, which must not be left out of consideration; possibly it may be deemed of great importance. This is a rate made, not by a vestry summoned in the ordinary manner, but in consequence of a monition issued from this Court, calling upon the churchwardens to take the necessary steps to put the church into repair, and directing them to call a vestry for a particular day, for the purpose of making a rate;

a mode of proceeding authorized by a precedent recently set in the Court of Arches. I have some doubts, which I expressed at the time, now not altogether dispelled, as to the propriety of fixing the day and hour; but, be that as it may, the rate howsoever otherwise made, is made in pursuance of the directions of this Court, and such directions, until the contrary shall be decided, I must consider as legal; indeed there is an abundance of precedent to support this course of proceeding. What are the authorities in the ecclesiastical law, in favour of a rate so made? With the single exception of *Gaudern v. Selby*, I am aware of none, and that case, if it be an authority at all, which I do extremely doubt, is an authority for making a rate by churchwardens alone, and not in conjunction with the vestry; for however the fact might be, nothing can be more clear than that Sir William Wynne never contemplated the present question.

Since the former *Braintree case* was agitated, Mr. Archdeacon *Hale* (a) has rendered a very valuable service, by bringing to light a collection of precedents with reference to the proceedings of the Ecclesiastical Courts to enforce the repair of churches; I have examined them all carefully, but in no one of them can I find the trace of an authority affirming the validity of a rate made by the churchwardens and minority of vestry. One indeed, though it is scarcely proper to cite a single precedent from a country Court, would shew that the supposed course was to direct the churchwardens alone to make a rate, and that to reimburse the

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(a) Precedents in causes of office against churchwardens and others. London, 1841.

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churchwardens of a former year. (a) I think I must be correct in saying that none of the precedents come up to the existing circumstances of this case; for if there were, they would not have escaped the learned counsel as well as myself. It may be well briefly to notice some of these precedents, observing at the same time, that there is a manifest distinction between the actual making of a rate, and the voting by vestry that a rate should be made; that if this distinction be not kept in mind, these precedents may go to a length which could not for an instant be now maintained, *viz.*, that a rate might now be made by order of the Ecclesiastical Court, without in the first instance, calling a vestry at all; this done, whether by commission from the Ecclesiastical Court, or order to the churchwardens, is clearly illegal. It may be that some of the precedents collected by Mr. Archdeacon *Hale*, are of this description, namely, precedents,—before it was decided that a rate made by commission from the Ecclesiastical Court, was illegal. The decision in *Rogers v. Davenant*, was not till 1675, where it was then decided that such rating by commission was illegal. A precedent, applicable to the present case would be a case where the rate was made by the churchwardens and minority in vestry, and afterwards enforced by the Ecclesiastical Court; a case where proceedings were had against individual parishioners, not to recover the rate, but to punish them, would not tend to uphold the validity of the rate, but the contrary. I shall endeavour, though very imperfectly, to classify some of the precedents.

(a) P. 98, anno 1601.

First. There are monitions to churchwardens to repair,—a proceeding strictly legal.

Secondly. Monitions to the churchwardens to call the parishioners together to make a rate, as in the present case.

Thirdly. Commissions for making rates,—which are illegal.

Fourthly. Monitions to churchwardens to make rates; but not, so far as I can discover, alone, but in the usual way, in vestry.

Fifthly. Orders that if the churchwardens do not certify repairs done, the case should be referred to the High Commission Court.

Sixthly. Instances of persons being punished for not paying rates made by vestry.

Seventhly. Several cases of interdict.

Not one case can I discover of a rate made by the churchwardens and minority, much less a case where a rate so made was enforced.

Recollecting the deep interest which this question of church-rates has excited, what laborious and painful investigations have been made by the most learned persons; and, also, that a question nicely divided from the present point, and intimately connected with it, has been adjudicated upon by no less than twelve of the Judges of this realm, and no *ecclesiastical* authority produced, I may, I think, without relying on my own pains, venture to say that none is in existence. It would be mere waste of time to go over the books cited in former discussions, and I shall abstain from such fruitless trouble.

Similar observations apply to common law authorities; the Judges say there are none applying

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to a rate made by churchwardens alone ; had there been any applying to a rate made by the churchwardens and a minority in vestry, they must have been produced. The solitary authority which used to be cited in support of a rate made by churchwardens alone, I mean the case in *Ventris* (a), has been disposed of by the Court of Error, so far as applied to the former *Braintree* case ; and there is nothing but conjecture, unsupported by facts, to make it applicable to the present. There is then no authority in the Ecclesiastical Courts or at common law to support this rate, but I am of opinion that the authorities cited against the validity of the former rate, have a strong application to the present case, and for this reason, all those authorities speak of a *majority* in vestry ; all appear to assume that the very foundation of a rate was the resolution of the majority, not one speaks or hints at a rate made by a minority as possessing any validity.

There is then, in my opinion, a total absence of any authority either in ecclesiastical or common law in support of the validity of this rate ; it is clear, therefore, that upon such grounds, it cannot be supported ; and that if I am to enforce such a rate on such a supposition, I should be making law, and not declaring it ; and that too in a matter where every Court has been most cautious, namely, the imposition of a tax.

Fifth head.

These preliminary considerations being disposed of, I now address myself to the last question, namely,

(a) 1 *Ventris*, 367.

whether, there being no authority in common or ecclesiastical law in support of the validity of this rate, nevertheless it is to be sustained by analogy to the law applicable, in particular cases, to corporations and elections. In applying my mind to this point, I feel the utmost distrust of my own ability to discuss or determine upon it with adequate learning or legal discrimination. The branch of learning, necessary to be known safely to understand this proposition, is wholly foreign to the practice and ordinary jurisprudence of these Courts, and if this doctrine be really the foundation on which such church-rates stand, it seems not a little extraordinary that it should have been for ages unknown to those Courts to whose exclusive jurisdiction belong all causes for the recovery of church-rates. I do most strongly feel that this argument belongs to Courts accustomed to cases of *mandamus* and *quo warranto*, and I distrust myself at every step I take regarding it. In stating the proposition, I shall endeavour to use, as far as I can, the words of the judgment in the Court of Error (a).—
 “Members of corporations aggregate, being assembled together for the purpose of choosing an officer of the corporation, if the majority protest against and refuse altogether to proceed to any election, they throw away their votes, and the minority, who perform their duty by voting, are held to represent the whole number.” On the same principle, it is contended that parishioners duly assembled in vestry for the purpose of making a church-rate, wanted to defray the expense of re-

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pairs (and to this may be added that the vestry was called in pursuance of a monition from the Ecclesiastical Court), the majority refusing, their votes are thrown away, and the rate made by the minority is good. To ascertain whether the two cases are analogous, two things are necessary; first, to understand the principle on which the proposition is supported at common law. Secondly, to understand and compare the facts of the two propositions said to be analogous, in order to see if there be a real analogy between them. I will extract, as well as I can, the common law doctrine from the authorities,—perhaps I ought more properly to say, the only authority cited; but before the comparison can with any propriety be made, another task remains to be accomplished. Before I can trace the analogy between the case of elections corporate, or otherwise, with church-rates, I must also consider the legal origin and usages with regard to church-rates; similarity or dissimilarity are not to be ascertained till the two things to be compared are understood. Reluctant as I am to attempt to enter at all at large into the history of church-rates, yet, in order to compare the making a church-rate with the election of an officer of a corporation, it is necessary that I should give an outline as to what, in my opinion, church-rates are, and the legal remedies for enforcing the repair of churches. That the parishioners are bound to repair the nave of the church is a proposition established by all authorities in all books of ecclesiastical or common law; but with regard to the origin of that obligation, its nature and the remedies for enforcing it, there is much room for difference of opinion.

I do not venture into paths proper to be trodden only by the learned antiquarian, I look to legal authority. The statute of *circumspecte agatis* (a), has, whatever it might have been originally, all the force and effect of a statute, and it, as appears to me, establishes the following points:—

First. That the parishioners were accustomed to repair the nave or body of the church.

Secondly. That the Spiritual Courts in those days *punished* persons who refused to do so; the words are:—"If prelates do punish for that the church is uncovered or not conveniently decked, the spiritual Judge shall have power to take knowledge notwithstanding the king's prohibition." The object of this statute was to prevent Courts of law using the power of prohibitions, preventing proceedings taking place by ecclesiastical authority, to compel repair of the church.

Thirdly, that the temporal Courts had interfered by prohibition.

Fourthly, that by this statute they were restrained from so doing; consequently the legality of the obligation, and the right of the spiritual Courts to punish, were established. As to the nature of that obligation, nothing is said in that statute, but all the authorities from the earliest times, to the present day, appear to me to shew what it was. The whole nation in those times, was of one religion, to profess a different opinion was heresy and a capital crime; to support that religion, was a religious duty, binding on the consciences of all, indispensable for securing the

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performance of those rites, which were deemed essential to the safety of the soul ; therefore, upon every account, the upholding of the sacred edifice, by those who were bound to uphold it ; and the religious nature of the obligation, gave the jurisdiction to enforce such obligation, to those Courts, which arose out of, and were connected with, the religious establishment ; the foundation of those proceedings was *pro salute animæ*, and it belonged to those Courts exclusively. The obligation was *in personam* and not *in rem*, it existed wholly independent of property, though of course and necessarily the extent, and degree to which the obligation was to be enforced must be measured by property, or in other words the ability of the individual. There could be neither religious, nor moral, nor equitable obligation to compel one individual to contribute in a greater *ratio* than another, and therefore ability was a standard ; ability included every species of property ; it was a direct tax upon none ; if I am correct in describing the nature of the obligation, it appears to me to follow, that it did not necessarily attach more particularly on any species of property ; it was no lien on land or on stock ; nor on one more than the other ; in those days, however, land and stock constituted the sole property yielding a profit ; therefore, land and stock became, in practice, the criterion of ability. If I am asked for authority, as to these positions, I need only refer to those collected in *Prideaux* (a), from *John of Athon* and *Lyndwood*—the opinion of the profession in Doctors'

(a) *Prideaux*, p. 58.

Commons, down to the *Poole case* (a), which decided by the authority of the Delegates that in ascertaining the ability, other property may be taken into consideration, as ships and stock in trade; with regard to land, it mattered not whether the individual who occupied it lived out of the parish, he was an inhabitant by his occupation, and rateable to church-rate as well as liable to other burthens and duties as an inhabitant.

I propose next to consider the *mode* by which this obligation was carried into effect. The statute of *circumspecte agatis* is wholly silent as to church-rates, the expression punishing those who left the church uncovered, affords no reason for supposing that church-rates then existed. I know not the origin of church-rates, nor any authority which fixes a date. The earliest case on the subject is in the year-book of Edward 3; but, though there may not be any direct evidence, yet their origin is most naturally accounted for. The legality of the usage of compelling parishioners to repair, established by the statute of *circumspecte agatis*, naturally led to the ascertainment of the ability of those so bound; a rate made in vestry by themselves was the fairest and most equitable mode of measuring the liability—the rate was incidental to and followed upon the obligation;—it matters little whether it be called a bye-law or not.

I now approach the question of remedies, and it appears to me that all the remedies were in strict keeping and unison with the origin and nature of the obligation;—they emanated from the Ecclesiastical

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Court alone, because the obligation was, as I have said, a religious obligation on the conscience, and not a charge upon property, nor a common law obligation with regard to property, in the ordinary sense of that term. Before the statute, the spiritual Courts punished not for making rates, for *non constat* that rates existed; but because the repairs were left undone by those who ought to have done them; such punishment must have been excommunication, and other ecclesiastical inflictions, and the imposition of fines, as the statute shews; and that this was so, is further demonstrated by the writ of consultation to be found in *Fitzherbert* (a), which I find in the pamphlet of Mr. Swan (b). The Ordinary being desirous to proceed against one R. de C. Knight for the correction of his soul for neglecting or rather refusing and expressly declining to amend and repair the nave or body of the church, it was suggested that the matter concerned a lay fee, and was a ground for prohibition. The Court was of opinion, that the party being impleaded of a lay fee, was not a sufficient ground for granting a prohibition, and a writ of consultation went to the Bishop; from which the inference is, that it is not a burden on property itself, but on the individual generally.

Precisely a similar course of proceeding followed, when rates had become usual and customary,—criminal proceedings, issuing from the Ecclesiastical Court—the result interdict, and excommunication of individuals. Looking at the consequences, both civil and spiritual, and to the writ *de excommunicato*

(a) Fitz. Nat. Brev., 116.

(b) Appendix, No. 8.

Capiendo, these remedies were all-powerful in those times, both with regard to the making of rates and enforcing the payment of them. Then came the Reformation, but no toleration; no one then could venture to offer resistance on the ground of difference in religious opinions; opposition was seldom offered, for not only the old remedies remained, but a new and most powerful engine for enforcing obedience was established; the High Commission Court was called into existence by the statute 1 Eliz. and continued to exercise its extraordinary power until finally annihilated by statute 17 Car. 1. Its authority was invoked for the purpose of compelling the repairs of churches. The 86th Canon directs all having ecclesiastical authority to hold visitations, to declare to the High Commission Court every year such defects in churches as they may find unrepaired, and the names and surnames of the parties found faulty therein. The high commissioners are then to proceed against them *ex officio*, and compel them to obey the decrees of the ecclesiastical ordinaries. Can any one doubt the efficiency of this tribunal, when its powers were administered by Archbishop Land and his coadjutors? After this Court had been deprived of its functions, the ordinary Ecclesiastical Courts still exercised the powers with which they were invested, and it clearly appears, not only from Mr. *Hale's* book, but from other authorities, that for the most part this power was exercised in the criminal, and not the civil form, by proceeding *ex officio* and not in a church-rate cause; most of his precedents are criminal. That such powers were effectual for their

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purpose, up to a very late period, I think no one can doubt, though true it is, they were induced for the purpose of enforcing their authority to resort to illegal measures, as the issuing commissions to make church-rates; all their original and legal powers remain untouched by statute; whether effectual now, it is not for me to say; into that question I must not now be led; they are not obsolete in law—they have a legal existence; but they never have been applied to enforce, or punish for not paying such a rate as this.

Before I quit this subject of remedies, I must very unwillingly speak of *mandamus*; unwillingly, because it is not a subject with which I am conversant or can attempt to fathom, but, because it may have some connection with the analogy which I am now endeavouring to examine.

It is said that a *mandamus* to make a church-rate has been refused, because church-rates are of ecclesiastical cognizance; what is the true meaning of this reason? I conceive that the history of the obligation to repair affords the true explanation; that church-rates are a mere incident to that obligation, and that obligation is of spiritual and not of lay cognizance, because that obligation is purely religious and binding on the conscience, and, therefore, enforceable in the Ecclesiastical Courts, on that ground, which is the foundation of all its proceedings, *pro salute animæ*.

Having thus as briefly as I could with a just regard to perspicuity stated my notion of the obligation to repair, and of the means of enforcing such obligation, I now come to the rules governing ques-

tions of election in order to compare the two subjects. The case of *Oldknow v. Wainwright (a)*, is cited as establishing a doctrine which is said to be strictly analogous to the present case, and ought to decide it in favour of the rate. Now what are the facts of that case? An election was to take place for the office of town-clerk of Nottingham; there were twenty-five electors, twenty-one of whom assembled, pursuant to summons; the mayor put Thomas Seagrave in nomination, no other person was put in nomination, nine of the electors voted for him, twelve did not vote at all, eleven of them protesting against any election, because the office was then full. The Court of King's Bench held that as the majority who dissented from the election voted for nobody else, the election by the minority was good. It is manifest that this case is wholly different in all its circumstances from the present, still it may afford a principle fairly applicable to it. Lord *Mansfield* decided in favour of the election of Seagrave, and upon a very clear and intelligible ground. That the electors present who did not vote at all, virtually acquiesced in the election made by those who did. Another principle was adverted to in that case, viz., that at an election those voters who vote for an unqualified person with notice of his incapacity, throw their votes away. Let us look at the present case. A vestry is held pursuant to a monition from this Court calling on the parishioners to meet on a certain day and make a church-rate, the subject matter is church-rate and not the election of a corporate officer, a rate is proposed, an

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amendment is proposed, put, and carried by shew of hands and no poll is demanded, then the churchwardens produced a rate of two shillings in the pound which is signed by the vicar, churchwardens and several rate-payers; this rate was not proposed to the vestry, nor put by the chairman to the vestry, there was no voting of any kind thereon. The facts of the two cases being thus totally different, I must now inquire whether such differences constitute distinctions. Is an election of a corporate officer or member of Parliament in *eadem materia*, with the making a church-rate? It appears to me that it is not. In the case of elections, a vacancy being admitted, the act to be done is choosing a qualified individual to supply the place; discretionary choice amongst qualified individuals is all that belongs to the electors. An election being begun, it must be finished. The making a church-rate under ordinary circumstances at least involves many other considerations, how is it possible to say, that because a rate is proposed it must be carried? or that like an election once began, it must be finished by making some rate? other points arise,—what repairs are necessary,—in what manner they shall be done;—whether the estimate be sufficient,—whether the repairs shall be done at once,—whether one rate shall be made for the whole or separate rates,—in what manner the rate itself shall be made. Surely even upon this brief comparison it would be difficult to say, that an election and the making of rates do not involve very distinct considerations. But compare the cases a little further; *Oldknow v. Wainwright* was decided on the principle that the electors who did not vote for Seagrave,

did not vote at all; that they acquiesced in his election; those are the words of Lord *Mansfield*; can the same thing be predicated of this vestry meeting? did they not vote at all? They voted for an amendment, refusing the rate; or, in other words, they in substance negatived the rate; most clearly then they did vote on the subject matter; to say in the face of these proceedings that they acquiesced in the making of the rate, would be to make a declaration in defiance of common sense and common reason; and what is more, this rate was not put to the vestry at all after the amendment, it was made by the churchwardens and some individuals putting their names to it. Then if acquiescence be the principle which governed the case of *Oldknow v. Wainwright*, such principle does not exist here; the voting for the amendment is not acquiescence. I will now take notice of another supposition, that though the majority did vote against the rate, their votes were thrown away in the same manner as votes are thrown away when given to an unqualified candidate at an election, with notice of the want of qualification. Are all votes given against a church-rate thrown away, or only in particular cases, and is this one? No one can contend that all votes against a church-rate are in all cases thrown away, for if this were so, it would be absurd to call a vestry for such purposes. Are the votes to be held to be thrown away because the repairs were wanting and a rate necessary? Why no rate made by a majority would be good unless these circumstances concur; *ergo*, all votes against all rates proposed, when a legal ne-

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cessity arises, are thrown away. From this conclusion I cannot escape, save I could adopt the principle that any vestry is merely ministerial without any discretion, and for such position there has been neither argument nor authority.

Again, what difference arises from this vestry being called in pursuance of a monition, issued from this Court, founded on a decree duly served on the parishioners, and supported by an affidavit as to the church imperatively requiring repairs; a monition calling on the parishioners to meet on a certain day, and then make a rate? That this monition has been disobeyed is perfectly clear, but the question now is, not how disobedience is to be enforced, or the parties disobeying punished, but whether the rate by the minority is valid? Whether the votes of the majority are thrown away? The act directed to be done by the parish is not done; the parishioners have not made a church-rate; some individuals have consented to one. Can I hold this to be a substitute for what is at least the ordinary definition of a legal church-rate,—a rate made by the majority in vestry? Here I am compelled, much against my will, and with a full consciousness of my own inability, accurately to understand or perspicuously to explain it, to consider the analogy with regard to proceedings at common law. Suppose a *mandamus* to do an act ordinarily and legally done by certain persons, as to put a corporate seal to an instrument, and suppose part willing to obey and part not, would the Court of Queen's Bench accept the will of a part for the deed of the majority, or rather would they not proceed to compel

the majority to do the act? Would it not be a bad return, or if the return stated that the writ had been disobeyed, would it not be a false return?

Having now to the best of my ability considered the analogy adverted to by the Court of Exchequer Chamber as a question thereafter to be considered, having sifted the case of *Oldknow v. Wainwright*, and the reference to the law of elections, the impression upon my mind is, that none of these principles or authorities are applicable to the present case, but even if I could discover similitude where I can see nothing but dissimilarity, even if the arguments were apposite to the subject-matter instead of discrepant from it, I should still hesitate before I ventured upon my own authority, as Judge of an inferior jurisdiction, in a matter of taxing the subject, to introduce, for the first time, a doctrine hitherto unheard of in these Courts, and, so far as I know, never applied to church-rates in any other. If this new doctrine be the law, it is a matter to me of extreme wonderment, that in the usage of centuries, when so many cases must have called for its application, when so many powerful minds have dedicated to the question their learning and ingenuity, it should first have been discovered in the year 1841; and more especially am I moved with astonishment, when I recollect that this doctrine, if tenable, would have taken away all necessity for interdict, excommunication, all ecclesiastical process, all interposition; on the part of the High Commission Court. A more easy remedy for the disease, a surer preventive against its re-occurrence, a more efficient substitute for severer and harsher remedies which were used; could not, I think, have been de-

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vised, yet, till the year 1841, though the necessity for the use of it so often must have occurred, there is in all the books in all the reports, ecclesiastical or common law, *altum silentium* respecting this panacea. And not only is there no mention of this mode of making a valid church-rate, not even when once or twice reference has been made to rates made by churchwardens alone, but all the authorities, on the contrary, describe a church-rate as a rate made by a majority in vestry. Surely stronger presumptive proof against the admissibility of this analogy could not be adduced. It has, however, been argued, that admit it I must, for that the ancient remedies are no longer fitted for the times we live in; that argument has already been answered by the Court of Queen's Bench, but if it had not been, am I judicially to decide that that which the law has not altered, is either inefficient for its purpose, or extinguished as obsolete? Did the Court of King's Bench treat wager of battle so, though a more revolting and unchristian practice could not have been retained from the ages of the darkest barbarism? Lord *Ellenborough* said, (a) "the general law of the land is in favour of the wager of battle, and it is our duty to pronounce the law as it is, and not as we may wish it to be; whatever prejudices, therefore, may justly exist against this mode of trial, still as it is the law of the land, the Court must pronounce judgment for it." But if I were at liberty to pronounce the ancient remedies insufficient or obsolete, could I invent a new one? Could I usurp the office of the Legislature, and;

(a) *Ashford v. Thornton*, 1 B. & Ald. 460.

jus facere non dicere." One more observation occurs before I leave this discussion: if I could consider the doctrine laid down as governing cases of election, to have an analogy to the present case, and I entertain no such opinion; still if I did, I am bound to decide this case, not by the rules of common law, but by the Queen's ecclesiastical law,—so says the statute—so says Lord Coke. Now that this doctrine exists in the ecclesiastical law, or has been imported into it by usage or otherwise, it has not even been attempted to be shewn; I cannot find even the faintest trace of it.

I am therefore of opinion, that this rate, so made by the churchwardens and minority of vestry, is not supported by any authority to be found in ecclesiastical or common law, and that the supposed analogy between these proceedings and elections corporate or Parliamentary, does not apply; it is, therefore, my duty to pronounce this rate invalid, and to reject the libel.

I am well aware of the heavy responsibility, which has attached upon me in the discharge of this arduous duty,—I well know how many evil consequences, or supposed evil consequences, may be attributed to my miscarriage, if I have failed to discover the legal truth; but this I know also, that I have industriously, earnestly, and fearlessly done my best to ascertain the law. Once convinced as to what the law is, I never will be induced to resort to subtle and ingenious refinements to defeat that law. Whatever may be, in the opinions of others, the pernicious consequences of adhering to it, I am well persuaded, from the history of this country, that the continuance of bad laws, and the prevention

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From this decision an appeal was prosecuted in the Arches Court, and on the 25th of March, 1843, judgment was delivered in that Court reversing the decision of the Judge of the Consistory of London.

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SIR HERBERT JENNER FUST.

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This is an appeal from the Consistory Court of London, in a cause of subtraction of church-rate, promoted by Messrs. Veley and Joslin, the churchwardens of the parish of Braintree, in the diocese of London against Mr. Gosling, a parishioner and inhabitant of that parish. A citation in the cause was taken out in January, 1842; it was returned into Court; an appearance was given for Mr. Gosling, and a libel was given in, which came on for discussion before the learned Judge of the Consistory Court on the 23rd of February, who took time to deliberate, and, on the 4th of May, 1842, he was of opinion, that the libel was not entitled to be admitted, and, accordingly, he rejected it. From that rejection, the present appeal has been brought, and on the appeal the usual proceedings have been had. The case was argued some time ago; and the Court, —from the importance of the case, took time to consider it, in order, as far as possible, to arrive at a correct decision. The arguments were to the same

effect, though not so extended as on former occasions; they were rendered unnecessary by the nature of the proceedings,—they were, however, the same as those in the Court below, and the case now comes before the Court for its decision. The parish of Braintree has obtained a considerable degree of notoriety from the fact of the determined opposition given by the great majority of the inhabitants of that parish to church-rates; and, as we are all well acquainted, a church-rate in that parish in 1837, gave rise to elaborate arguments and decisions in Courts of law, as well as in the Consistory Court of London. As the present case is admitted to have grown out of the former proceedings, it may not be inconvenient, indeed it is necessary to a proper understanding of the point now to be decided, and to the grounds upon which the decision will be made to rest, to consider the nature of those proceedings, and how far they relieve the Court from the task of entering upon the topics which were, of necessity, introduced into the discussion in the course of those proceedings. [The Court here stated the proceedings in the former case, and continued]. From the nature of the proceedings, and the tenor of the judgment of the Exchequer Chamber, it seems, that if it had simply affirmed the judgment of the Court below; if the Judges who sat in error, had contented themselves with merely affirming that judgment, without giving any reasons, the present question, in all probability, never would have arisen; but the Lord Chief Justice of the Common Pleas, in delivering the judgment, which he was authorized to do by the seven learned Judges who sat with him, took care to state

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specifically, the precise points decided by that judgment; and the only points decided, were, first,—that the rate, as it appeared on the face of the libel, was illegal, as being made without competent authority; and, secondly, that a prohibition ought to go, restraining the spiritual Court from enforcing it. This precise declaration of the points decided, naturally leads to the inquiry what did appear on the face of the libel, and upon reference to it, it appears that a vestry, duly summoned, had refused to grant a rate which had been proposed, and the churchwardens, three or four days after that vestry meeting had been formally dissolved, of themselves made a rate, without giving any further notice to the parishioners; and the point therefore decided, was, that a rate made under such circumstances, was illegal and invalid. The question being, as stated by Lord C. J. *Tindal* (a), “whether the churchwardens of a parish, after a rate for the necessary repairs of the parish church, has been proposed by them to the parishioners, at a vestry meeting, duly convened for that purpose, and has been refused by a majority of the parishioners there assembled, can, of their own sole authority, at a subsequent time, by themselves, and not at any parish meeting, impose a valid rate on the parishioners.” In a subsequent part he says (p. 305, line 27): “The question to be resolved, is, whether, after a meeting has been duly convened, and certain of the parishioners have attended, and the majority of those who so attend, have refused to make any rate for the necessary repairs of the church, the churchwardens have autho-

(a) 12 Ad. & Ell. 300.

nity, by themselves, and not at the meeting at which the refusal took place, but at a subsequent time, to make a rate that shall be binding on the parish." Now the precision with which the question to be resolved, as stated by Chief Justice *Tindal*, is very remarkable; he does not state, as a general proposition, that, after a refusal of a rate by the parishioners, no rate can be made by the churchwardens, under any circumstances, but simply, that a rate having been refused by a vestry duly assembled, the churchwardens had no authority, without notice, at a subsequent time to impose a valid rate upon the parishioners. He carefully guards the judgment from going one iota beyond the precise limits of the case before the Court; and the reasons for this extreme care and caution are apparent, when that judgment is examined with greater particularity. The points to be decided in the two Courts of law were the same, and the opinions of both Courts were the same, namely, that the rate in question was illegal, and could not be enforced; but there was a material variation in the two judgments, in regard to the mode in which a rate might be made. Upon reading the judgment of the Lord Chief Justice of the Court of Queen's Bench, it would seem, that in his opinion, and that of his learned brethren, no valid rate could be made, unless with the consent of the majority of the parishioners, in vestry duly assembled. The whole tenor of his reasoning, and his comments on the authorities cited, go to that effect. He states the question raised by the decision of the Consistory Court to be, whether the churchwardens have power to impose a church-rate against the declared will of the

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judges of the Exchequer Chamber, as to the mode in which a rate might be sustained against the opinion of the majority of the parishioners in vestry assembled ; and accordingly, it appears, that in the course of the year 1841, the proceedings stated in the libel given in in this suit were adopted. [The Court here went through the several Articles of the libel.] I understand that when this libel came on for discussion in the Court below, various objections were made to the form of it ; they were there overruled, and they have not been pressed in this Court, and the libel now comes on to be considered on the real and substantial question, "Whether the churchwardens and those who are admitted to have been a minority of the parishioners in vestry assembled, can impose a valid rate on the parishioners, after a rate has been refused by the majority of that vestry duly assembled in pursuance of a notice legally issued, and whether such rate can be enforced in this Court." It is not necessary for the Court to go into a lengthened inquiry as to the nature and origin of the obligation of the parishioners to repair their parish church, or to inquire into the antiquity of church-rates ; all that discussion might have been very important when the question first arose, but it is obvious that it would be perfectly useless and superfluous in the present instance, the whole result of all the arguments and authorities on the point are most perspicuously stated by Lord Chief Justice *Tindal*, in delivering the opinion of the Court of Exchequer Chamber: he thus states the extent and nature of the obligation by which parishioners are bound to repair their churches. (a)

(a) .12 Ad. & Ell. 301.

" We are all of opinion, that the obligation by which the parishioners, that is, the actual residents within, or the occupiers of lands and tenements in, every parish, are bound to repair the body of the parish church whenever necessary, and to provide all things essential to the performance of Divine Service therein, is an obligation imposed on them by the common law of the land. That such obligation is not grounded on the force of the general Ecclesiastical law is manifest from this, that, by the authority of all the writers on the general Canon law, the repairs of the whole of the parish church, both the body and the chancel, fall upon the rectors or owners of the tithes ; except that by custom, in some countries, part falls upon the parishioners ; whereas in England, by the common custom of England, the repairs of the nave of the church, in which the lay parishioners sit, falls upon the parishioners themselves, and the repairs of the chancel fall on the rector. No trace can be found in any of our books of an obligation on parishioners to repair the parish churches throughout the whole of the realm less wide and extensive than this ; and, as to the antiquity of this obligation, the case cited in argument from the Year-book, 44 Edw. 3, fol. 18, whilst it establishes the fact that church-rates were made by the parishioners at so early a period as the year 1370, does at the same time, by a plea therein contained of a custom from time immemorial within the particular parish to levy the amount of the rate on each parishioner by distress, necessarily carry back beyond the time of legal memory the obligation of the parishioners to make a rate upon themselves for the reparation of the

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parish church ; and such a custom, existing beyond the time of legal memory, and extending over the whole realm, is no other than the common law of England." And then his lordship cites a position of Lord *Holt's*, in support of this proposition : so that according to C. J. *Tindal*, the obligation of repairing churches by the parishioners is carried beyond the time of legal memory, by necessary inference or by special custom, in those parishes in which occasion for the repairs arose. This is abundantly sufficient authority to enable this Court to hold, that the burden of the repair of a church is cast on the parishioners, and that it has existed beyond the time of legal memory. The mode of making rates for providing for such repairs, and apportioning the expenses among the parishioners has also existed beyond the time of legal memory. Take it to have been originally nothing more than custom, when once a custom is proved to have existed beyond the time of legal memory, it becomes the common law of the realm, which is nothing more than a body of customs.

This being the result of that investigation the next inquiry is, what is the extent of the obligation ? We are told by the same authority, which cannot be disputed (p. 303). " The repair of the fabric of the church is a *duty* which the parishioners are compellable to perform, and not a mere *voluntary* act, which they may perform or decline at their own discretion ; the law is imperative upon them, *absolutely*, that they *do* repair the *church* ; not binding on them in a qualified limited manner only, that they may repair or not, as they may think fit ; and that, where it so happens that the

fabric of the church stands in need of repair, the Only question upon which the parishioners, when Convened together to make a rate, can by law deliberate is, not whether they will repair the church or not (for upon that point they are concluded by the law,) but how, and in what manner, the common law obligation, so binding on them, may be best and most effectually, and at the same time most conveniently and fairly between themselves, performed and carried into effect." Every word of the passage of this judgment, which I have just read, is most important, and deserving of the utmost attention, not only from the high situation of the very learned person by whom it was delivered, but as conveying, in the most clear and lucid manner, what is the law, and what its extent as to the obligation of parishioners to repair their church, and as expressing, not only his lordship's own opinion, but that of the seven other learned judges with whom he was associated on that occasion. I take the judgment of the Queen's Bench to be the unanimous opinion of the four judges of that Court; and so I take this judgment to express the unanimous opinion of the eight judges who met in the Exchequer Chamber; and I also assume that the Lord Chief Justice of the Common Pleas was fully authorized to deliver the unanimous opinion of the Court of Exchequer sitting in error.

The next question seems to be, how is this common law obligation to be performed? I consider it quite unnecessary to go into the question whether this is "*commune jus laicum*," or "*commune jus ecclesiasticum*," because, if it be the first, the temporal Courts have jurisdiction to enforce it, if it be

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1843. the latter the Spiritual Court has the jurisdiction ;
 March 25th. it is still the law of the land ; C. J. *Tindal* says,
 VELEY (p. 303) “ The parishioners have no more power to
 and throw off the burden of the repairs of the church
 JOSLIN than that of the repairs of bridges and highways,
 against the compelling the performance of the latter obli-
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 whilst that of the former has been exercised usually,
 although perhaps not necessarily exclusively, by
 the Spiritual Courts from time immemorial ”—
 thereby affirming, not only the imperative nature of
 the obligation, of the parishioners to repair their
 church, but that the mode of doing so is by rates,
 and which mode has existed from before the time of
 legal memory ; and also affirming the jurisdiction
 of the Spiritual Court, if not quite, yet almost ex-
 clusively to enforce it, according to law.

The following results seems to flow from this.
 First,—the obligation to repair is absolute ; second,
 —the performance of the obligation may be com-
 pelled ; third,—the performance of the obligation
 may be properly enforced in the Ecclesiastical
 Court ; subject nevertheless, as appears by the
 former *Braintree case*, to be controlled by the com-
 mon law Courts, whenever the Ecclesiastical Courts
 are exceeding their jurisdiction, or attempting to en-
 force an illegal or invalid rate. The question then is
 reduced into a very narrow compass, namely, what
 is necessary to constitute a valid church-rate, and
 in what manner is the payment of it to be enforced ?
 Now as to the first, it is quite clear, that a rate made
 for the repair of the church by a majority of the
 parishioners in vestry assembled, after due and legal
 notice, is a valid rate, and may be enforced, against

persons who refuse to pay the amount at which they are assessed, by the process of the Ecclesiastical Court, and that without the fear of prohibition. The same may be said of a rate made by the churchwardens, where the parishioners, after having been duly summoned, refuse or neglect to attend the vestry. "As little difference (says C. J. *Tindal*) (a), arises, as to the validity of a rate imposed by the churchwardens alone, where a meeting of the parishioners has been duly convened in vestry for the purpose of making a rate, but where none of the parishioners have thought fit to attend,"—certainly not, for in this, as in the former case, the rate would be made by the whole of the parishioners; for those who do not think proper to attend, after being duly summoned, must be considered as concurring in the judgment of those who do attend, and as submitting themselves to pay any rate they may think proper to make. In either of these two cases, therefore, no difficulty can arise; the difficulty is, what is to be done, when the parishioners, on whom is cast the absolute obligation of repairing their church, refuse to make a rate for that purpose; is the church to remain in a dilapidated state, of course becoming deteriorated more and more every day, or is there any mode by which they may be compelled to discharge the imperative obligation cast upon them by the common law? It is quite clear, that the rate sued for in the former *Braintree* case was invalid, for it was made by the churchwardens alone, not at a vestry meeting duly summoned for the purpose, not at a parish meeting of

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any kind, or after notice given, but, at a meeting held four days after a vestry legally called for the purpose of making a rate, had been formally dissolved. The present is a totally different case, it is that of a rate made at a vestry meeting, whilst the parishioners continued duly assembled in vestry, after due notice of a vestry meeting, for the purpose of making a rate to repair the church, had been given, and after a monition had issued from the Consistory Court of London, calling on the parishioners to meet and make a rate; at a time, therefore, when all the parishioners, who might wish to attend, had ample opportunity of seeing what was the nature of the rate, what were the repairs proposed to be done, and what was the estimated amount of the expense of the repairs, and the mode in which the rate was proposed to be apportioned; a very different rate from that made in the former case. In the language of *C. J. Tindal*, "there is a wide and substantial difference" between the two rates; the one was made at a secret conclave of the churchwardens, with no check upon them, the parishioners having no opportunity of knowing what was the estimated amount of the repairs, and having no opportunity of controlling the expense; for,—although parties have an opportunity of objecting, after a rate has been made, to the amount, by objecting to their proportion being levied, they can only do so by incurring some expense; on the other hand, they incur no expense by making the objection when the rate is proposed. If a rate made, as this rate has been made, is invalid, there is no possible mode, which I am aware of, by which this church

can be repaired, the necessary result will be, it will become a wilderness, with a heap of ruins:—view the progress made towards this consummation of things in this case; what is the history of this church? In 1834, it was repaired at an expense of 35*l.* In 1836, 105*l.* was required, and a rate was refused; in 1837, 508*l.* was necessary; and in 1841, 723*l.* is the estimated sum:—indeed, the schedule of the necessary repairs shews, that unless some measures are speedily adopted, the church must become unfitted for Divine worship. Where then must the performance of the obligation to repair the church be sought? That the Courts of common law have no power to enforce it, is, I think clear from the case of *Rex v. Thetford, Inhabitants (a)*, in which Lord *Kenyon* refused a mandamus against churchwardens to make a rate, because it was a matter of ecclesiastical cognizance; although in another case, a Court of law did go so far as to grant a mandamus to the churchwardens of the united parishes of St. John's and St. Margaret's, Westminster, not to make a rate, but to call a meeting, for the purpose of agreeing upon and ascertaining the monies and rates to be assessed for the repair of the church of one of the parishes. The only remedy, therefore, is in the *Ecclesiastical* Court, if there be any remedy at all. Now it has been said, that there were anciently two modes of enforcing the performance of this obligation in the Spiritual Courts, one by interdict of the place, the other by excommunicating those, who refuse to contribute their proportion of the expense. Both of these were

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formerly most efficacious remedies, the consequences were so serious, that there was scarcely, if ever, a necessity for having recourse to them. In the words of Lord C. J. *Denman* (a), "either of these penalties was too awful in itself, and in the sufferings of those who incurred it, to fail of producing the desired effect; or more probably the denunciation was alone equal to its purpose, and the mischief may never have existed in the earliest times."

There is authority no doubt for both these measures; even in the earliest times there are not wanting instances of the necessity of proceeding to them, but the injustice of one of them (Interdict,) is apparent on the face of it: "*ecclesiastica censura prohibens celebrationem Divinorum.*" By that mode of proceeding the whole parish was punished for the fault of a part of it; the misfortune of it was, that in those times, and under those circumstances, the innocent were punished with the guilty; it was no light matter the placing a whole parish under interdict from attending Divine service, and partaking of the Divine offices of its church, it could not be right that for the fault of one person, the many should be deprived of the opportunity of attending Divine service in the parish church; the interdict extended to the whole of a parish, and it was no easy matter to resort to other churches for the purpose of partaking of the Divine offices, such as marriages, and so forth; for excommunicated persons were cut off from all places of worship: indeed, if any person knowingly held communion

(a) 12 Ad. & Ell. 245.

with an excommunicated person, that person himself became *ipso facto* excommunicated. If this process could now be put in force by this Court, the effect would be to punish the innocent alone, the persons, by whose fault such a proceeding is called for, would be the very persons who would consider it a matter of congratulation and triumph, that they had reduced the parish church to such a state that no Divine worship could be celebrated there, whilst those who were ready to pay their proportion of the repairs, would be deprived of partaking of the offices of their own parish church. What would be the effect of the other remedy? —Excommunication,—that also was found in former times an efficient remedy; but civil disabilities are now all removed from excommunication; the utmost effect would be, that a few of the most pertinacious opponents to a rate might, in order to compel them to contribute their proportion of it, be imprisoned,—the present substitute for excommunication. Would that have the effect of compelling the performance of these repairs, would the punishment of a few, produce the desired effect? It is admitted that such a power does exist, but it is manifest that the effect of it will not accomplish what is desired, namely, performance by the dissentient parties of that obligation which the law of the land has thrown on them; therefore, both these modes are utterly inefficacious at the present period. In what mode is the process of excommunication to be put in force; how is the Ecclesiastical Court to be put in motion; by what means is the necessary expense of the proceedings to be defrayed? The proper persons to institute the ne-

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cessary proceedings are the churchwardens, it is their business to take care that the church is repaired, and the necessities for Divine service provided:— are they to do so at their own expense? According to this modern doctrine they cannot be reimbursed, for there can be no hope of procuring the necessary funds from the parish; the very majority who have caused the necessity for the proceedings, would be sufficient to negative any rate for defraying the expenses of them. Both processes then, Interdict and Excommunication, are unavailing. Then can a rate be made in any other manner? Or, are those parishioners, who are willing to discharge their part of the obligation, and desirous of attending Divine worship in this parish church, to be compelled to see that church become a heap of ruins? are they to be driven to resort to private establishments or to meeting houses? If such be the state of the law, every person who will consider the subject, must surely feel desirous that some mode should be devised, by which this singular anomaly may be put an end to. Is this rate a legal rate, and is there any mode of enforcing it? It has been argued, that if these two processes, (Interdict and Excommunication,) are inefficacious, there must be some other mode of compelling the making of a rate; that this Court must necessarily have the power to adopt some other mode; but it must be remembered, that this Court cannot of itself make a law to meet the exigency of the times, any measure adopted by this Court must be supported by principle, or by the authority of legal precedents. Can this rate be so supported, how stands the question on principle? The object of

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them on that point." This was a burden,—or, call it a tax,—existing long before this vestry meeting was summoned. It has been asked more than once in the course of this discussion, of what use is it to call a vestry meeting, if, when the parishioners are assembled, they have no voice to exercise in the matter? there is no difficulty in the question; the answer is, they have a voice in the matter; the churchwardens cannot make a rate without calling a vestry meeting, and when the parishioners are met, it is the duty of the churchwardens to lay before the meeting the nature of the repairs required; the estimated amount of them; and the mode of apportioning the amount among the parishioners; all these points are proper subjects to be discussed at such meeting. Making a rate, and imposing a tax are two very different things: the real meaning of "making a rate," is, the equal apportionment of an existing tax, among the persons liable to contribute to defray it: in this case, the tax is already imposed; this vestry has declared they will not make—they will not apportion the rate among themselves; in other words, they will not do what the law has said they are bound to do. The law has said, that it is a legal obligation on them to repair their church; they have declared they will not fulfil the legal obligation; and in saying so, they prevent the rest of the parishioners doing their duty, for, if the minority can make no rate, it follows that no rate at all can be assessed or collected; by a sort of solecism, the minority will be compelled to resort to the voluntary system.

There is, therefore, no difficulty in finding principles on which to act in this matter; the difficulty

is, to find authorities to support the principles. On principle,—first, there is no injustice apparent in the case; it has not been shewn that the rate is unnecessary, or that the parishioners had not an opportunity of canvassing the repairs proposed; estimates were brought forward, but the majority of the vestry would not inspect them; they would have no rate at all; and, be it remembered, they may now withhold their shares of the rate, and may thus object, in this, or in other Courts, to this very rate, on every ground, and on all circumstances, under which, in any event, they would have a right to object to it. Cases have been cited to shew, that churchwardens cannot make a rate binding on a parish, unless where the parishioners, duly summoned, have refused or neglected to attend. It is admitted, that in such case the churchwardens may of themselves make a rate, and on this principle, that then they virtually represent the whole parish; they are the majority of the parishioners in vestry assembled. This is a general proposition of which there is no doubt. I know of no decision, except the one I am now reviewing, in which it has been held, that after due notice of a vestry, a rate made by churchwardens, and a minority, in vestry duly assembled, after a majority have, at the very same vestry, refused to make any rate, is an invalid rate; true it is, that the reasoning of the judgment in the Queen's Bench, seems to infer, that it would be so, but it is no decision, for it was not the point before the Court; the circumstances of the case before that Court were very different. Moreover, the Judges in the Exchequer Chamber guarded themselves against being supposed to concur in the

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general proposition of the Queen's Bench, 'no rate could be made, without the consent of a majority of the parishioners, in vestry assembly they stated, "that they gave no opinion or point;" but this Chief Justice *Tindal* did say "that there was a wide and substantial difference between a rate made by churchwardens and a rate made without notice, at a time subsequent to the dissolution of a meeting, which had refused a rate, one made by churchwardens and a minority, at the same meeting where the refusal took place." Judges of the Exchequer Chamber would not go out of their way to notice the distinction unless it was one which, in their opinion, clearly existed. It is scarcely necessary to notice the authorities, they have all undergone a thorough revision in the former case. *Degge* says: "If parishioners, duly assembled, refuse to make a rate, the churchwardens may of themselves make one, but, in the *third edition* of his Book (1681) adds,—"but some are of opinion that the churchwardens cannot proceed alone, *ideo quære*." *Tindal v. Jones* (a), is to the same effect; but it has been stated by the Courts of Queen's Bench and Exchequer Chamber to be a "suspicious," an "unsatisfactory" authority. But among the authorities, the case of *Gaudern v. Selby* (b), has been much dwelt on. I think this case did meet with the attention, in the Court of Queen's Bench, which is due to it; I think, to a certain extent, it has been calumniated. The Court of Queen's Bench repudiated it as an authority, and I think the case was not properly presented to

(a) 1 Vent. 367.

(b) 1 Curt. 394.

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Sir *W. Wynne* did not intend to decide this point; that, in point of fact, he thought he was deciding on the question, whether, in any event, churchwardens could make a rate of themselves? whether, after a vestry had been duly summoned, and the parishioners did not attend, a rate could be made by the churchwardens, without a majority of the parishioners; but this is mere conjecture; the true distinction between the two cases, as it appears to me, has never been understood. But am I to assume that all the circumstances of the case were laid out of Sir *W. Wynne's* consideration? that they had no weight in his decision, when they were so pointedly called to his attention; namely, that this was a rate made by the churchwardens, without a majority? In deciding that case, Sir *W. Wynne* decided on all the circumstances of it, and on the consideration due to them. I have been told,—what is perfectly true as a general observation,—that judgments are to be confined to the cases immediately before the Courts in which they are given,—Is this case an exception? Why, suppose Sir *W. Wynne* decided this case, when all these circumstances were not present to his mind. I am not at liberty to assume any such thing; and, as this case may be of some importance, I have no hesitation in saying, that it is not liable to be impeached, on the ground of being an anomalous case, and not worthy of notice. Grant that there were irregularities,—they were committed in the Court below; no objection was taken on that ground, in the Court of Arches; Sir *W. Wynne*, sitting as the Judge of this Court, could not dismiss the appeal on account of irregularities in the Court below; in the further-

ence of justice, he was bound to hear the case on the merits. But, in point of fact, were the irregularities in *Gaudern v. Selby*, such as the party appellant could take notice of? I very much doubt if they were such irregularities; I have found a case in which it was held, that irregularities of such a nature, were not sufficient to vitiate proceedings in an appellate Court; it is a case in 1713, *Townshend v. Lewitt and Page* (a). A citation issued in the name of John Rogers, as the commissary of the Archdeacon of Leicester, and also in the name of George Newell, official to the archdeacon; it called on Mary Townshend to answer to Lewitt and Page, the churchwardens of All Saints', Leicester, in a cause of subtraction of church-rate. Articles were exhibited against her in the name of the commissary and official. Some of the acts were sped before the commissary only; in others, he had acted for Newell as official. Sentence was given by Newell the official; he signed the sentence as surrogate to the commissary; the party cited was condemned in the rate and expenses; the cause was brought to the Arches by appeal; it was objected that the proceedings were a nullity; in other words, the manner in which the cause had been conducted in the Court below was so irregular, that the party ought to be dismissed, without the Court proceeding into the merits of the case; the arguments were of considerable length, and it was insisted, that the same person could not sit as Judge in two distinct capacities. Cases were cited on each side, one, *Deakins v. Newell*, from the same judges, which it was said

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(a) Arches, 4th Session Hil. Term, Note of Dr. Andrew.

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was dismissed on the same account ; on the other side, *Biddle v. Parsons*, determined in the Arches, on appeal from the same judges, and no objection made to their acting jointly. Reference was made to an award of the Bishop of Lincoln, between the official and commissary,—and this shews how impossible it is for this Court to decide on such cases without knowing all the circumstances of them,—it turned out there was an arrangement, that these two persons should sit *simul et conjunctim*. An award of the same nature was made by Archbishop Whitgift. The answer to the objection was, that it should have been made before issue joined, *exceptio fori declinatoria est, et ante litem contestatam opponi debet* (a) ; the result of the proceedings was this, that the objection not being taken when it ought to have been, the Judge decided, that he must proceed to hear the case on the merits, and the result was, the party was dismissed with his costs. In *Gaudern v. Selby*, there are a variety of seeming irregularities, but if an opportunity had been given for explanation, they might have been explained ; at all events they ought to have been objected to before issue was joined on the appeal, but no objection was taken by counsel on behalf of the appellant. It has been attempted to explain this, by saying, that owing to the press of business in the Admiralty Court in 1798, Lord *Stowell* had just become the Judge of the Admiralty, and that he had signed the appellant's case. But who were the counsel for the appellant?—Dr. *Arnold* and Dr. *Sewell*, neither of these persons were likely to neglect the interests of their client,

(a) Parnormitan.

they would have seen any objection of the kind, and would have advised their client accordingly; no objection was taken to the proceedings, and the cause proceeded to a hearing. If this judgment of Sir *W. Wynne* had not met with the approbation of a large majority of the profession; if it had been thought that the case was not rightly decided, and that the rate was invalid, would not the party have been advised to appeal. Under these circumstances, surely Sir *W. Wynne* must have decided the case on the merits. Be the irregularities what they may, they do not detract one iota from the judgment; Sir *W. Wynne* must be taken to have decided, that the rate was a good, valid, and legal rate, capable of being enforced in the Ecclesiastical Court. Sir *W. Wynne* was the last Judge, who would have made a law, he invariably took the greatest care to satisfy himself as to what the law was, but when he had once done so, he never hesitated to pronounce what the law was. I look upon his decision as a direct, positive, and absolute decision on the present point, as a precedent binding on this Court, and which neither I, nor any Judge of this Court, am at liberty to depart from. Whether the judgment in the Courts of Queen's Bench has shaken the authority of the case, is a question I am not at liberty to enter into; if I was satisfied that the judgment was not founded on authority and a just apprehension of the law, I might then refuse to be bound by it, but not thinking so, I have no objection to shelter myself under the authority of Sir *W. Wynne*, and to express my opinion that, what he has pronounced to be law, is law. That judgment in no way militates against the de-

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cision of the Queen's Bench, the point before that Court was not the point decided in *Gaudern v. Selby*. Did the Court of Exchequer Chamber repudiate this case as an authority? Undoubtedly they have not so expressed themselves; it was no precedent for the case before that Court. Have not the Judges of the Court of Error said, that, "there is a wide and substantial difference between the cases,—between the case then before them, and a case, which might possibly occur,—in fact this very case. What is the meaning of the term "wide and substantial difference?" must it not mean such a difference as will tend to a different result in the decision of the two cases. So far then from repudiating that case, if compelled to do so, I should rather say they adopted it; otherwise I think they would not have thrown out the observation, that it was a point deserving of great consideration, on which they reserved to themselves the power of forming an opinion whenever it should occur. Can I suppose those Judges would have gone out of their way to make use of such marked expressions, unless they really attached some importance to the distinction between the cases? on the contrary, I think the supposition is rather in the alternative, that they would have guarded themselves from the possibility of being supposed to have entertained even a notion of the existence of any such distinction. I therefore consider the case of *Gaudern v. Selby*, as a direct authority for this rate; the learned Judge of the Consistory Court has said, that it is neither a precedent, nor an authority; I am of a different opinion, I think it a very considerable authority. It has been said, that the decision in that case came

by surprise on the profession; that the Ecclesiastical Commissioners, in their investigation of the law were not aware of such a case. As a member of that commission, I do not know that I ever heard of the case by its real title, but, at a very early period of my entering this profession, I was always led to think that the law was such, and had been so laid down; nothing can be more clearly shewn by the report of the ecclesiastical commissioners than this, that in their opinion such a case might arise. If my recollection serves me, I always understood, that, although the point was doubted, the better opinion was, that such a rate was a good and valid rate, but I well remember, that at an early period of my communication on the subject with the learned Judge of the Consistory Court, he entertained a different view of the law.

The Judges of the Exchequer Chamber have assimilated this case to that of the members of a corporation, meeting to elect corporate officers; the Chief Justice says, (p. 308,) "we do not enter into the discussion, how far such case may be analogous to that of the members of a corporation aggregate, who being assembled together for the purpose of choosing an officer, the majority protest against, and refuse altogether to proceed to any election, in which case, they have been held to throw away their votes, and the minority, who have performed their duty by voting, have been held to represent the whole number." It has been already seen, that parishioners cannot deliberate on the question, whether they will make a rate or not, after once the necessity of the repair of the church has been made out, or not disputed; then,

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if they have no power to vote against a rate, and yet persist in doing so, do they not throw away their votes, just as much, as in the case of a corporate election, the majority of the corporators throw away their votes, or privilege of voting, when they refuse to proceed to the election of the officer; and are not the minority entitled in the one case to make a rate, as in the other to elect the officer? Surely, there is no great difference between the cases, although the one may concern the exercise of an elective franchise, and the other the defraying of a tax, already imposed by law. Whether there is a real distinction between the cases in the view of the law, I will not undertake to say; in principle, there seems none; in both instances, those who vote for the rate, or for the officer, are, numerically speaking, the minority, but legally speaking, they are the majority; they represent, in the one case, all the parishioners, in the other, all the corporators. I do not know that it is absolutely necessary for every parishioner or for every elector to give an actual vote, there may be persons who may wish to attend, and yet to be neuter, and there may be others who may content themselves, simply by protesting against the rate. Neither do I intend to enter into the question, whether this is not in some manner analogous to voting for a disqualified candidate at a public election, though there certainly does seem some analogy in principle, for if a party will give his vote in a manner in which he has no right to give it, is not this similar to voting for a party, who is not entitled to hold the office, to which it is sought to elect him?

I am of opinion on these principles, which are supported by the decision of Sir *W. Wynne*, that this is a valid legal rate; there is no decision at present against it, with the exception of the judgment I am now reviewing. The judgment of the Queen's Bench may have gone to the extent, that it is an illegal rate, but the Exchequer Chamber has stopped short of affirming this; so far from repudiating the case of *Gaudern v. Selby*, the Judges of the latter Court seem to me to have affirmed the principle of it.

Without entering into the questions raised in the objections, which have been most ably urged, and which have caused me much anxiety and difficulty in upholding this rate, although one that is perfectly reconcileable with justice and equity, as is shewn by the principles arising out of the questions on corporation law; looking to all the circumstances of the case; to the reasonable nature of the repairs to be done; seeing that the measures of Interdict and Excommunication are ineffectual; that the mode of proceeding is simple and just; and that the party will still have every opportunity, which under any state of circumstances he could have, of objecting to the rate, it appears to me, that reason and principle do strongly support the authority of *Gaudern v. Selby*, supported as I think that case is, by the opinion in the Exchequer Chamber. As to the case of *Thursfield v. Jones*, although, after the observations made on this case, and to which I have alluded, I consider it as no authority on the main point, it certainly contains an expression of an opinion, that

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in the matter of enforcing the repair of a church, the churchwardens are the parties to be cited; undoubtedly it is so. We are indebted to arch-deacon *Hale* for a publication of great importance and value, containing very many precedents of such proceedings; in all the cases the churchwardens are the parties cited, they are the parties liable to do the repairs, they are called on to certify the doing of the repairs; they are to summon the parishioners to meet, and make a rate; and if, when summoned, the parishioners will not meet or concur in making a rate, the churchwardens may make a rate of themselves. The churchwardens are the parties to be proceeded against; if they are not able to obtain funds, they are still the parties to be cited; on a presentment of the state of a church being made, the churchwardens are to shew cause against it, they are the persons primarily liable, and they must excuse themselves as they best can. In many instances it appears, that the churchwardens have been assigned to do certain acts, and to certify they had done them; in others, they have appeared and alleged the inability of the parishioners, by reason of poverty, to repair; in those cases, they have been relieved from the present effect of the citations, and further time given them to make the repairs. In one of the cases in this book, it appears, among other things, that a commission issued against the churchwardens, —illegally so, undoubtedly. In another case, a monition issued to the churchwardens, they returned they had done all they could to compel the repairs, but that the parishioners would not do

them. In one case, a monition issued, and no appearance being given, it was held, that the necessity of the repairs was thereby admitted.

Therefore, without entering further into this question, it does appear to me, that both law and justice require, that I should reverse the judgment of the Court below ; my opinion is, that the law is as stated by Sir *W. Wynne*, and according to my opinion of the law and justice of the case, to reject this libel would be to do that, which would be contrary to law. I may not be supported in this judgment, a prohibition possibly may issue, from the Court of Queen's Bench ; possibly if that be so, the result may be, that a writ of error may be sued out, and it is further possible, that the Court of Error may think that that is not law, which is now stated by this Court, and was formerly stated by Sir *W. Wynne* to be law. All this may be the result of my decision, but I have no right to anticipate such a result, but that the distinction will be upheld, when I find that the Judges of the Exchequer Chamber, have reserved to themselves the power of forming an opinion upon this very case, if ever it should occur. It is also possible that the case may go up to the Judicial Committee, a distinct branch of the profession ; the members of that Court will have to hear the case, and to consider it with reference to the conflicting judgments, and I do not doubt they will do justice. If this case goes up to the Judicial Committee, the whole point in difference will be settled ; at present all that is decided is, that churchwardens cannot by themselves, make a rate out of vestry, at a subsequent time after a rate has been refused by a

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majority of the parishioners, but it has not yet been decided, that they cannot make a rate under the circumstances in which this rate was made, where the majority have refused to make any rate at all. It may hereafter be a question whether the Legislature ought not to take some steps to enforce the repair of parish churches. I think the judgment of the Court below is erroneous, and, therefore, I reverse it, retaining the cause, and reserving the question of costs.

APPENDIX.

The Reporter having been favoured by J. B. Greenwood, Esquire, with Mr. GURNEY's shorthand note of the trial in an action of ejectment in the case of *Greenwood v. Greenwood*, before Lord *Kenyon* and a special jury, on the 13th of May, 1790, has thought that he should render an acceptable service to the profession by printing the summing up of the case, and the remarks and directions to the jury made by the learned Judge on that occasion, as containing a clear and lucid exposition of legal principles applicable to cases of partial insanity or *monomania*.

The defendant in this cause, Wm. Greenwood, the brother of the deceased, had previously brought an ejectment in the Court of Common Pleas, and obtained a verdict against the will; the defendant in that action being then in America, having heard of the verdict, immediately returned to this country and commenced this action of ejectment in the Court of King's Bench. The case on his behalf was conducted by Lord *Erskine*, then Mr. *Erskine*, and by Serjeant *Adair* for the defendant.

It is remarkable that a case so important in itself, and which has been so often referred to as a leading case, should have never been reported. See the *Attorney General v. Parnter*, 3 B. C. C. 444. *White v. Wilson*, 13 Ves. 89. The trial of *James Hadfield* for high treason, 27 How. St. Tr. p. 1311. *Dew v. Clark*, 1 Add. 283; 3 Add. pp. 95, 96, 97, 98. *Dew v. Clark*, by Dr. *Haggard*, p. 16.

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This is an action of ejectment brought to try the title to several houses, &c., in the parish of Hillingdon in this county, and the character of the persons who contest it, as they stand in near relation to each other, although competitors upon this record, are Abram Greenwood, the plaintiff, who appears to be the cousin, and William Greenwood, the defendant, the brother and heir-at-law of the testator.

At the outset of the cause, things necessary to have been proved, if they had not been admitted, were admitted, namely, that the estate in question belonged to Mr. Greenwood, the deceased. The will was produced, and there is no sort of dispute, but that all the formalities required by law were complied with.

Mr. Owen proved the will, which entitled the party who claimed under it, to read the will, and as far as I can judge from the texture of the will itself (which is proved to be in the handwriting of the testator) there is nothing that can possibly lead one to suspect that he was not in full possession of his understanding at the time the will was made, there is not a mistake, nor trip, nor expression that betrays want of understanding in it.

And the account that has been given of the persons to whom legacies are given, shews that his mind extended to a considerable compass, and that those legacies were given upon such fair grounds as might reasonably influence the judgment of a sound mind in making a disposition of his property.

But though all this be so, yet if in further canvassing the business, it should appear to you that there was something about this testator which put him in a situation in which the law of this country and the law of reason too, says that he should not dispose of his property; the will, however formally made upon the face of it, however fairly made at the time, ought not, and, therefore, will not, by your verdict, prevail; but before I state more minutely what the question is, let me do that which I know is unnecessary to be done,—considering the rank you hold in this country,

yet I should not discharge my duty to my own feelings and the public expectation too, if I did not say something about it.

There is nothing that is more apt to seduce one than one's wishes respecting the propriety of a measure, and, therefore, there is nothing upon earth that one ought to be more careful to get rid of, when one applies one's mind to judge of a question, than all these circumstances which might lead one's wishes, and, therefore, debauch and seduce our judgment.

In this case, considering the relation and the happy harmony that has existed between them for many years, it is impossible that a man should not at the first blush of the business, wish that the property of the deceased brother had devolved on the defendant, but that ought not to weigh a feather in the scale, it ought to have no influence upon your judgment. We ought not to look to the right hand or the left, but to see what the disposition is, provided we are convinced that the disposition was correctly made; and it would be of the most dangerous consequence upon earth if every man was to look at the disposition made, and form his own ideas of the propriety or impropriety of it, whether it suited what his wishes were that the testator should have done, and thence judge whether the testator should have done it or not.

Mankind are as capricious as they are many in number, and every body knows that there is hardly a will made but goes some way to vary the succession appointed by the law of the land. Many great estates held by the first characters in the country, the first in virtue, have come to them through a disinherison of the heirs-at-law. If no fraud was committed, but the faculties of the testator were in a situation in which they could exert themselves, the will is not to be tripped up because you or I or other persons would not have made the like disposition in the like circumstances.

On the one hand we are to take care that a will made by a person not competent to make it, shall not be obtruded to the disinherison of the heir-at-law. And on the other hand, to take equal care, and be equally anxious that if the will is properly made, it shall prevail, however hard it may bear upon

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those who would be our favourites in equal circumstances, and how hard soever it may bear upon the interest of those whom the feelings of man and almost the ordinances of God require should be provided for. We must see only whether the will is the will or not of the testator.

It is expedient upon this case, as upon all other cases, to state the question accurately before one applies oneself to decide it; and I am not sure that it was stated with perfect accuracy, though at the first blush of it, not much receding from accuracy by the learned serjeant, but with not perfect accuracy; I think, in some view of it, there is a possible fallacy.

He stated that the question was, whether the disposition was the effect of madness or of sound mind, I am rather inclined to believe that some persons in judging of it, would look first to the act done, and argue up from that to the sanity or insanity of the mind, instead of looking at that which is the real question, and which the law ever considers to be the question, namely, *whether the testator was of sound and disposing mind and understanding when he made his will?* That is the question which the wisdom of ages has framed, and which as often as the question arises in Courts of justice, and is put into form, in those words it is put into form.

Having therefore, stated to you the question which I am sure your own good sense had presented full to your minds before, I will, with your leave, bring back to your memory that evidence which was given so many hours ago, that, perhaps, some mention of it, though not the main parts, may have slipped out of your minds.

The first witness called is a very respectable gentleman that sits under me; he says, he knew Mr. Greenwood four or five years, from his leaving school and going to college; that in the summer of 1786, he dined frequently with him, sometimes at the house of Mr. Benton the witness; sometimes at the house of the deceased Mr. Greenwood; he frequently conversed with him; he always appeared to him to be a man of remarkable good understanding; he sat at his table as master of his family; appeared to conduct the affairs of his family, and to have the supreme management of his family.

As far as it appeared to him there was no sort of derangement of mind, and he never suspected it from any part of his conduct or behaviour; that since this question arose he has taxed his own memory to recollect all that ever has passed, and upon reviewing all that he recollects, he cannot think of any single circumstance in his life that has appeared to him like derangement. He says that he frequently observed with concern the coolness between the two brothers; that there was no conversation between them when they sat together at dinner; that they lived together, but appeared, though under the same roof, to live at great distance in point of communication with each other. The deceased was at his house the day before he went to Lisbon; he came there to take leave of him; he had dined there two or three days before; that at that time—which is the very important time in this case,—there was not the least appearance of any derangement.

Mr. Greenwood was a steward of the Assembly at Uxbridge; he conducted himself in a sober and discreet way, and there was nothing odd in any part of his behaviour.

Now to be sure that may seem *en passant*, not a very important circumstance, his being Master of the Assembly, but, however, it brought him into a mixed company; attentions were to be paid to various people, and a mind that was not in an exceeding good situation at the time, might have betrayed the want of it in some circumstance that at a public assembly would hardly have passed unnoticed. Upon his cross-examination he says, Mr. Greenwood appeared to him a remarkably acute, sensible man; that it appeared to him they were a most cordial family during the father's lifetime.

Dr. Reynolds is the next witness; he says, on the 24th of November, 1787, Mr. Greenwood consulted him; he consulted him again on the 4th of December; he conversed with him on his illness, which was a consumptive case; that at that time, in his opinion, there was not any appearance of derangement of intellect; that he conversed as a sane man perfectly well, and described his disorder with accuracy to him. Upon his cross-examination, he says, it is common for men, sensible on general subjects, to be insane on particular subjects; that persons of acute, quick parts, and weak

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nerves, are more apt to go towards a state of insanity, and when they are attacked by a disorder of that kind their recovery is more difficult.

Mr. Pope is the next witness ; he knew Mr. Greenwood from his infancy. He saw him in July or August, after the death of his father ; he had heard he had been extremely ill after his father's death, though he had not heard what the nature of his disorder was ; he was at two assemblies which Mr. Greenwood conducted at Uxbridge ; that he remembers dining with him, his brother and sister, and two or three families in the neighbourhood ; that he saw him occasionally with his family in the spring and summer of 1787, it was evident there was a difference between him and his family, but the witness could not guess what it was. That he has often seen him with his family, and never saw the least act that induced him to suspect insanity ; that there was nothing like it, either in his conversation or appearance ; that he went with him to Dr. Warren, to consult him ; he saw him most days in October ; he thought him very ill, and advised him to take advice ; in consequence of that, Dr. Reynolds was called in ; he pressed him to go to Lisbon. This was at the latter end of November ; he called upon Mr. Greenwood at his chambers one evening ; there were several gentlemen there ; they all pressed him very much to set off immediately for Lisbon ; he said he could not go till he had settled his affairs. Mr. Pope suggested to him that there would be no great difficulty in getting somebody to manage his affairs, and offered himself for that purpose.

The next morning he called on him, again pressed him more on the subject, and made an offer of himself to take care of his affairs that he might go to Lisbon, but did not choose to undertake that trust by himself,—he wished somebody joined with him, and then, in order to feel his pulse with respect to his brother, proposed his brother ; but that he said in a determined way, “ he shall have nothing to do with my affairs.” Nothing like insanity appeared. He then proposed Mr. Hilliard. The testator said, “ Do you think Mr. Hilliard will take it ?” He promised to go and ask Mr. Hilliard ; he applied to him ; he consented to take the trust ;

he pursued his conversation upon this business very sensibly. Some days afterwards, Mr. Greenwood drew up an account of his affairs, in order to leave with him when he went abroad; he had almost daily meetings with him about the business; he found him remarkably exact in the state of his affairs, nothing marked him as insane. He then produces the paper, which is in the testator's handwriting, and which I need not trouble you with rehearsing again; he said he found all the statements contained in that paper to be correct,—all marked with good sense.

On Saturday, the first of December, he took himself and the cousin, who is now the object of his bounty in his will, in his carriage to Little London. On Sunday, the 2nd of December, the witness called upon him, and found him treating with a man who came to take some land of him. On Monday he saw him again; he assisted him in making the agreement for letting the land; he appeared to him to conduct that bargain very sensibly. On that day he, the plaintiff, the defendant, and the witness, went together to town,—as he went, he saw tears frequently in the eyes of the gentleman who is the defendant upon this record,—the brother of Mr. Greenwood; that nothing in the testator's look or actions at the time, marked an insane man. He says, that on Tuesday, the agreement with the tenant was perfected, and the lease that had been drawn, was on that day executed. On Tuesday, the 5th day of that same month—December, a letter of attorney was executed to him and Mr. Hilliard calculated to give them the power which was necessary to conduct the affairs of this gentleman while at Lisbon; on that day they dined at Mr. Hilliard's, and Mr. Blencowe, a respectable gentleman in the county, who lived near them, was there; that he spent the evening with Mr. Greenwood, talking about his affairs; he made memorandums, and calculated his servant's wages accurately; he observed that the wages ran high, and said that his brother, though able in point of fortune, never contributed to the servant's wages.

On Wednesday, the 6th of December, he called upon Mr. Greenwood about seven or eight o'clock in the after-

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noon, and assisted him in packing up his books and papers, he left him at about ten or eleven o'clock at night; Mr. Greenwood said to him at parting, "I will now sit down and make my will;" he said he had mentioned the circumstance of his intention to make a will to him several times before; the testator was in declining health. It being a late hour of the night, the witness suggested that it would be better not to make his will at that time, but to do it some evening at an inn on the road, but the testator answered him, "No, I will make it to-night." On Thursday the 7th, he saw him again, and Mr. Owen and his clerk either came with him, or immediately followed him into the room; when they came in, Mr. Greenwood said, "Well, Pope, I sat down and made my will after you were with me, and now I will execute it." He then produced the will; the witness saw each of the sheets were signed; the testator took up a dry pen, and either drew the pen over the name, or pointed to it, and said "That is my name;" he is not certain which, nor is it of any importance as to the validity of the will. Mr. Pope observing that the coachman stood at some distance, and the testator being hoarse and speaking low, asked the coachman whether he heard the words, "that he published and declared it to be his will;" upon that the coachman, coming near, the testator repeated the words, and it was then attested by the witnesses. Then he folded up the will, and put it in a cover, and desired the witness to seal it, which he did, and another cover was put round it, which had something written on the inside, that the person who opened that cover might know who the executor was, and, therefore, to whom the will was to be handed, and also it gave directions with respect to matters which could not be postponed to any great distance of time, namely, about his funeral; then it was folded up in another piece of paper, upon which Mr. Pope wrote that it was Mr. Greenwood's will. He, conversing with him at that time, thought him completely sane, and fully capable of managing all his affairs; he never saw either anything in his countenance distorted, or anything in his mind disturbed; he received a letter from Mr. Greenwood, dated "Lisbon, the 10th of January,"

that letter I need hardly read again; you recollect it gives a long, accurate, and sensible account; he seems to have had a perfect recollection of what had passed before he left London; he particularly recollects the commission entrusted him by Mr. Justice Heath, to buy him a pipe of wine.

Upon his cross-examination, the witness says,—that in Easter Term, 1787, he discovered a very strong coolness in Mr. Greenwood towards his brother; that he did not speak to his brother; that if he wanted to be helped to a dish at table that stood near his brother, he had the dish removed to him, rather than ask his brother to help him. That one day he threw back a letter which his brother William had given him, with marks of contempt and ill-will to his brother. He says, after Trinity Term, 1787, the collector of the land-tax came for taxes while they were sitting after dinner; after having cast up the amount of them, he wrote a draft upon a banker's cheque, he applied to the witness and to his sister for a pair of scissors; his brother took out a pair of scissors and put them towards him, but he refused to make use of them, and tore the cheque off immediately. There was, in all his conduct, a marked unkindness to his brother, and it was clear to him that there had been some disagreement, though he did not know, at that time, in what it consisted. Mr. Greenwood gave him directions to kill some doe venison at Christmas, and send to Mr. Justice Heath, and some other neighbours; he did not mention his sister. Mr. Pope said his sister would be visiting somewhere at Christmas, should he send some to her; he said, "Yes, by all means." He gave directions to sell all his horses generally. Mr. Pope put him in mind that his sister had made use of one of his horses, and it would be inconvenient to her if she was to be deprived of that animal; upon which he directed that that particular horse should not be sold: he says, he observed marks of great dislike to his brother at this time, but never had observed these marks of dislike till about Easter Term, 1787.

Then Mr. Justice Heath was called; he states that he was acquainted with the deceased; he knew him from 1784; was frequently in his company when at his country house,

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and he never had, upon the whole communication he had with him, the least suspicion of insanity during his life; he conversed as a man of good understanding. He says he was not in his confidence so as to hear anything about his private affairs, but the turn of the conversation was those general topics which exercise the conversation of gentlemen.

Mr. Blencowe is next called, he is a gentleman of fortune and of undoubted respect and character in the neighbourhood; he says that he was acquainted much with the testator, he saw him in the end of the year 1786 and in 1787, and he was frequently at the house of Mr. Blencowe, and Mr. Blencowe at his, indeed they saw each other almost daily, he says that both the brothers were frequently together, that every body in the neighbourhood knew, and he had observed, that there was a coolness between them, he never saw any impropriety in the behaviour of one brother or the other, except that there was a sullenness in the testator, that they did not speak together, that Mr. John Greenwood always appeared as a man of sound mind, that he never saw any rudeness between the brothers, but a great degree of sullenness. He dined with him at Mr. Hilliard's, the day he made his will, he seemed then very conscious that he was in danger, though not in a desponding state, he confined himself altogether to a vegetable diet, drank no wine, or other inflammatory liquor; in the evening he played at whist, he shewed no anxiety, but played his game as a man of good sense would do. It was notorious to his relatives that he was going to Lisbon, in his journey he was accompanied only by his servant, John Turner.

Mr. Long, the surgeon, says, in March, 1787, Mr. Greenwood applied to him for his advice, he saw him frequently for about a fortnight, and conversed with him, he perceived no sort of derangement, not in the smallest degree, he attended him again in the same year in May, and again in August, that he explained to him the nature of his disorder, that he consulted him upon it very sensibly, that he did not observe the least degree of derangement. Upon his cross-examination, he said that insane people

often appear sound on general subjects, but he never talked to him about his brother.

Mr. Conant knew Mr. Greenwood, he was intimate with him at Cambridge, he heard he had been ill after his father's death, that he saw him in 1787, he called upon him in 1786, he saw his brother, a common friend at that time was with him, he asked to see Mr. Greenwood, the deceased, the defendant, the brother, said he could not, as he was not well, upon that he heard the voice of John Greenwood, who said, "it is quite otherwise, I am very well." In 1787, the deceased called on him, and conversed with him for a considerable time, he paid attention to his conversation and conduct, to see if he could find anything like a derangement in it, but could not discover the least traces of derangement, he saw him frequently afterwards, he took particular notice, but he could not observe in him anything like insanity, he conversed with him frequently till a few days before he went abroad.

Upon his cross-examination, he said, that it was some months after he had heard his voice, before he saw him, that he never talked to him about his brother, or his private affairs, that Mr. Greenwood had once a great affection for Mr. Jones, his tutor. In the beginning of the summer, he saw Mr. Jones at Mr. Greenwood's chambers; when Mr. Jones was taking leave of Mr. Greenwood, he told him he was going to call upon his brother; "Wm. Greenwood," said he, "is a damned scoundrel."

He saw Mr. Greenwood afterwards with Mr. Jones, that Mr. Greenwood then behaved unfriendly to Mr. Jones, he does not believe Mr. Jones had given him any real cause of offence, he reflected in very pointed expressions on Mr. Jones, as a man wanting principle; he gives an account, which has not been well explained, not for want of any attention in Mr. Conant, (perhaps it was not very explainable,) that Mr. Jones had spoken in favour of Archdeacon Paley's book, Mr. Greenwood said that book would not constitute a man of principle, Mr. Greenwood said he had but a bad opinion of the clergy in general, Mr. Jones took that as a reflection upon himself, and there were some

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unkind words between them; that Mr. Greenwood then said to Mr. Jones, "I suppose, from this conversation, I think me a madman!" he afterwards spoke to Mr. Greenwood about Mr. Jones, and Mr. Greenwood did not answer, he had now no further connection at Cambridge. He said that the deceased was at that time, in his opinion, so much master of his reason, as to be capable to dispose of his property, beyond all doubt.

Mr. Dampier was then called, who says, in Michaelmas Term, 1785, Mr. Greenwood became his pupil, to be instructed in special pleading, he attended him from that time till near Easter, 1786, he was then absent at Michaelmas, 1786, continued with him till the summer of 1787, he then appeared far gone in a consumption, he was not the least derangement in his state of mind, he continued always capable, and he had continual opportunities of observing him, he never talked to him about his family affairs, that he has seen William Greenwood frequently in his office with John Greenwood, but that he never saw anything which called for any observation from him respecting their conduct to each other, he thinks to all intents and purposes, he was as sane a man as he ever conversed with; before Michaelmas, 1787, he had heard of his coolness to his brother, and his former insanity, and he observed him in order to discover if there were any trace of insanity remaining, that he proposed his brother to him as the person to leave the conduct of his affairs with, that he did not fly out then, but rather evaded giving him an answer to the question; Mr. Dampier said certainly I should have attested his will, if he had been asked, and he was not known the contents, that the will disinherited the heir-at-law; I dare say Mr. Dampier has his reasons for that.

Dr. Ball says, he lives at Hillingdon Common, he knew Mr. Greenwood; after the death of his father, he had heard of his insanity; from the conversation he had with him, he did not believe the account was true, he discovered some symptoms in him of a deranged mind, he thought him a man of great abilities and understanding of his age, he said that he, the witness, said to Mr. Greenwood, "I wish you

hangs were as good as your head;" he should have had no objection to attesting his will at any time when he saw him.

Mr. James Wortham was concerned in a cause for Mr. Greenwood, he took instructions from him several times, he was perfectly master of his understanding, he asked Mr. Greenwood whether he would draw the declaration in his own cause, he said he would not draw it, because that would abridge the attorney of his fees, he prepared the letter of attorney from him to Mr. Hilliard and Mr. Pope; on the 6th of December, 1787, he saw him, and he seemed perfectly well in his mind, that he directed the witness not to part with the possession of the letter of attorney, till he should give him further directions, he had no reason to believe him insane from any conversation he had with him, from what he saw of the state of his mind, he should have had no objection to attest his will.

Mr. Dampier was asked about a letter from Mr. Greenwood, which he had in his hand, (he produced it,) which gives an account of the difficulties he encountered when he got on ship-board at Falmouth, and he also produced a written opinion of Mr. Greenwood's, which certainly as far as one reads it, seems the opinion of a man in full possession of his reason, giving his opinion respecting the conduct of a cause, and the rights of certain parties which were stated in a case laid before him.

The reverend Mr. Pope says, he lived near Mr. Greenwood, he knew him from his childhood to his death, he saw him in the summer succeeding his illness, he paid him a visit to congratulate him on his recovery, he had at that time no knowledge of his having been insane, he had no disordered mind, no disturbed spirits, his conversation was exactly as it had used to be, he frequently saw him and his brother together afterwards, he observed a considerable degree of coolness; the first observation that he made of that, was in the month of August, 1787, that nothing ever led him to suppose from the conversation that he had with him at any time, that he ever had been deranged, he went with him with some persons who were

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examined before a magistrate, he could not but admire the adroitness with which he examined the persons, the accuracy with which he got at the truth from those who wished to disguise it.

Mr. Hill, an attorney, knew Mr. Greenwood four or five years, he transacted business with him in 1787, he went to a copyhold Court with him, that Mr. Greenwood might be admitted to some copyholds which he claimed, he appeared to him to be very capable of managing his own affairs, he has seen him at turnpike and land-tax meetings, he joined in the business of the meeting; he should have had no objection to draw or attest his will; did attest one of the powers of attorney.

Dr. Freeman was next called, who says, he knew the deceased from his cradle, he saw him in the summer of 1786, and in the summer of 1787 frequently, he was in a large company at the witness's house, he had heard of his insanity, he then appeared to him a sane man, if he had been incapable of taking care of his affairs, he thinks he could not escape his notice, he says, he never conversed with him relative to his confinement, or his brother's conduct.

Mr. Skinner is called; he says he treated with him about taking a house; he appeared a man of understanding; he did not discover the least want of capacity.

John Whittington says, a week before Mr. Greenwood went abroad, he took some meadows of him, he seemed to him perfectly able to transact business.

Mr. Owen, the witness to his will, the gentleman that lived over him in his chambers, is called again, he states that they were in the common habit of breakfasting with one another without any ceremony; in November, 1787, in a conversation he mentioned his brother, Mr. Greenwood said, "yes, my brother is a very fine gentleman;" he conversed afterwards with him, he seemed to him perfectly well, he had a high opinion of him as a man of business and as a man of letters, that he was astonished to find that he had been treated as a madman, that afterwards he endeavoured to recollect all that had passed between them

and he could not think of any circumstance on which he could put that construction, if he was insane, he thinks he must have observed it, he said he was a man of an uniform and amiable disposition.

Now, gentlemen, this is the case on behalf of the plaintiff, and to be sure, if the case were to rest for decision upon the evidence that has been brought on the part of the plaintiff in the cause, one may venture to say, without saying too much, that a stronger case of sound mind and understanding, competent to dispose of property, never was laid before a Court of justice; but though that is so, one is not to rush on to conclusions, without hearing what is said on the other side, it is due to the parties in this cause, it is due to the general administration of justice; both sides have a right to be heard—if one side has kept back material circumstances, or if it was not in the power of their witnesses to disclose them, injustice would be done, if the conclusion was to be formed, before what the other side can say in aid of their case, and to develop the whole case to a jury, has been said and attended to on their behalf.

The first witness called on the part of the defendant, was Mr. Hingerston, the apothecary. On the 22nd of April, the day after the father's death, he was sent for to Mr. John Greenwood, he told him, he had had a shivering fit; he was extremely feverish; either Mr. Greenwood or some person in company, said he had taken some brandy and water, and that he thought himself poisoned; he says, he thought him to be in a very melancholy dejected state; he saw him again on the 23rd, that he was then freer from fever, but the fever even then did not intermit, as he wished it would have done. On the 24th, he saw him again, he thought him freer from fever, but it returned on that night, accompanied with a delirium; that he was restless and suspicious; he made complaints to him of his brother and servant, and hinted that some plots had been made against him; that he seemed much under a fever and delirium; wanting further assistance, Dr. Pitcairn was called in, and ordered the bark; that the bark was taken

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plentifully. On the 25th, he seemed greatly better, and then again he spoke to him of his suspicions of having been poisoned. The fever returned on the night of the 25th with great violence; the next time he saw him, he talked very incoherently, it was necessary, he thought then to have some coercion put over him, and means of coercion were used; he never saw him after the 23rd of June; that he never was, after the 25th of April, as long as he attended him, free from delirium. Between the 10th of May, and the 23rd of June, he spoke to him in favour of his brother, he thought him then in a delirium; he always saw William Greenwood when he went to the house, he behaved in the most affectionate manner, and shewed the greatest concern for his brother's situation; he says, that there is nothing more usual than for insane persons to be jealous and to conceive antipathies, and generally these antipathies are against their best friends; as long as the disease continues, so long the antipathies continue.

Upon his cross-examination, he says, there are antipathies often without any degree of madness, that he considered the delirium as symptomatic of the fever, that he was never free from the fever while he attended him; from the 7th of May to the 23rd, no medical man attended him, to the knowledge of this witness; he verily believes no medical person did; that after the keeper came to him, he believes there was occasion for coercion, and the keeper had a considerable degree of control over him. He knows nothing of his situation from the 7th to the 23rd of May, he thought he would never get better, for though the fever abated, yet the delirium did not; during the continuance of this fever and delirium he complained of his brother, particularly as to Price; he thought him a very fit person to be entrusted with the care of him; from the 7th of May to the 23rd of June, nobody could have conversed with him without seeing that he was in an insane state.

Dr. Pitcairn attended Mr. Greenwood's father, he attended the son on the 24th of April, he had a little fever, he appeared much reserved; he cannot speak from what he saw.

of his state of mind. On the 25th, he was easier, he had scarcely any fever. On the 26th, he was sent for early, he had been ill in the night and unmanageable, he thought it was necessary he should have a keeper; he says, that jealousy and suspicion of those around them, are common symptoms of a distempered mind, and that it is common for that jealousy and suspicion to continue, when to many other purposes the patient appears to be well. When he saw this gentleman, he thinks nobody could look at him without perceiving that he was in an insane state.

Dr. Budd says, he was applied to by Mr. Jones, on the 8th of May he prescribed for him, he did not see him till the 23rd, he attended him almost every day till the 28th of June, he conversed very little, he said he was well, and that he supposed that he, the witness, was come to repeat the same farce as the day before; after about ten days he would talk with him for five or ten minutes upon any indifferent subject, but would not speak about his own health, he believes he took the medicines that were ordered for him. In his opinion, there was a necessity that there should be some person who could control him, to take care of him.

He thought he had a fever accompanied with insanity, he was in hopes the delirium was symptomatic of the fever, but it did not prove so; as far as he observed, he found William Greenwood, the brother, most attentive to him; in 1787, he met him, and thought he had a peculiar wildness in his appearance; he met him afterwards, thought him not well, he perceived also this wildness in his appearance;—this was during the time in which all the other witnesses who have been called for the plaintiff, speak of him and conversed with him, and say, they saw no symptom of insanity;—he says, that from the appearance of his eyes, he thought he was insane at that time, pretty late in the year 1787.

On the 10th of May, he says, he first prescribed for him, that he had not seen him at that time, he prescribed only once, and that was from the representation which had been made of him by Mr. Jones; he says, that Price was with him when he saw him on the 23rd of May; he said but a few words whilst he was there, he was very shy, particularly

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when his brother was there ; that he complained much of having the keeper about him, he made no other complaint ; he said, there was no occasion for Price ; he talked with him upon a variety of subjects, and talked very well with him upon those subjects ; he did not stop him, when he met him in the street, above a minute or two.

Upon his cross-examination, he says, sulkiness is usual in madness, and madmen usually complain of restraint.

Price was next called, he is an assistant to a person who receives unfortunate people at Hoxton, he has been in that situation eight years, he attended Mr. Greenwood in 1786, he came there about the 26th or 27th of April, he staid ten weeks in all. Mr. Greenwood was sometimes in low spirits, sometimes high, the witness thought him disordered in his mind. One morning early he got out at his window, there was no other way to get out of his room, without coming through the room in which the witness was, he got out, he thinks, between three and four in the morning, he came home again late that night with Mr. Jones. Mr. Jones told him Mr. Greenwood had a knife ; the witness asked him whether he had a knife, he said he had none ; when searching he found a knife in his bed ; Mr. Greenwood was very angry at this, so angry, that Price did not think it safe to trust him without a strait waistcoat ; he put one upon him. Another time, he threw a candlestick at him, then he put a strait waistcoat on him. He was with Mr. Greenwood in London, he appeared to him much in the same state of mind then, which was not so well as he should be, he saw him go to the pump to fill his kettle ; that he never heard him express any suspicion ; that he was removed to town about June ; he staid ten weeks in all : he thought him not quite well when he left him, though much better : Mr. William Greenwood always behaved kind, but John Greenwood was very shy to him. The witness treated him generally, according to the best of his judgment ; he thinks he was not in his perfect mind while he was with him.

Upon his cross-examination he says, he put on a strait waistcoat twice ; he thought Mr. Greenwood was not clear in his head when he left him ; he did not recollect a

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that he met him afterwards, but the deceased then refused to return his salute; he would not bow to him, but passed on; he never saw more affection, prudence, and good sense in any brother than in Mr. William Greenwood, and he was never witness to any cruelty exercised on him by his brother.

Upon his cross-examination, he said, he saw him once while Price was in the house, but Price was not in the room with him.

Mrs. Evans was next called, who said, that the family appeared to her always to live happily together; that she had a letter from him, which appears to be written during the time that it has been generally understood that he was certainly in a fever, and in a state at times, if not during the whole season, of delirium; that letter speaks of ill usage, of wanting her to come and rescue him, and to make peace and so forth.

The first meeting Mr. John Greenwood had with his brother and sister, after his illness, was at her house; at the first meeting he behaved kindly to his brother and sister; the latter end of that year and the year after he behaved very coolly; at the meeting he shed tears very much; the witness says, they dined that day with her; they all went in the afternoon and drank tea at Mr. Higginson's; they returned again and supped at her house; she saw him again the next day, then he behaved well; he was reserved, but there was nothing which appeared to her to be a departure from reason; the appearances were the same, he was grave, he still continued grave, but nothing like a departure from reason; she saw him frequently afterwards in the autumn of 1786; in the winter of that year and in the spring of 1787; she saw him frequently, once twice a week; she observed in him a great coolness to her brother and sister; he barely answered them if they spoke; she saw nothing else particular in his conduct.

The Rev. Mr. Thomas Jones says, he was tutor to Greenwood, at Trinity College, in Cambridge; that there was a great intimacy between the deceased and him; he came to Cambridge on the 5th of May, 1786;—that was

night he escaped out of the window ; he sent a note to him expressing the distress he was in, wishing to see him at the Rose Inn ; he went to him ; he found him dressed in deep mourning, very pale ; he came up to him immediately, clasped him in his arms and shed tears abundantly, and he appeared to him to be in the greatest distress ; he said, he had lost the best of fathers, that his friends had deserted him ; the Higginsons, Livie, and his brother too had deserted him, and had spread a villainous report of him, that he had been undutiful to his father, and been accessory to his father's death, and that they had confined him ; and then he said, " Will you go with me to London ; " Mr. Jones said, " Yes, most certainly, I will go with you immediately ; " he had much conversation with him on the road ; he appeared to be low and melancholy ; he shed tears and complained repeatedly of his confinement. Being apprehensive for his personal safety, observing the state of mind he was in, he asked him if he had any knife, giving as an excuse for borrowing it, that he wanted to cut a rough stick in his hand ; he got the knife from him ; his mind was much altered to what it had been ; he was vastly low and melancholy, sighing and shedding tears, and complaining of things which he thought could not have taken place. Just before they got to town, for fear he should lose all confidence with him, he restored to him the knife, but immediately told the family the circumstance, that he had a knife in his custody ; he did not, at that time, think him in possession of his right mind. They went to Little London, the witness, Mr. Higginson, the deceased, and Mr. William Greenwood ; he stayed there two or three days ; the testator continued in the same state of mind as in London ; he complained that his friends had deserted him ; Mr. Jones argued with him upon it, that this was not true ; he asserted the contrary very strongly, and affirmed it with great confidence. The witness applied to Dr. Budd : he says, Mr. William Greenwood's conduct, during the whole that he could observe, appeared affectionate and anxious in the highest degree for his recovery. He saw Mr. Greenwood again in London, about the 20th of June ; he found him

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still low and melancholy, but not so bad as before; he continued with him about a fortnight; he says, he appeared to have a great dislike to his brother, and to be in great indignation with him; he went with him to Little London; during that visit, he talked to the testator often of the manner in which he behaved to his brother; the reasons he assigned in answer, were the general ill-treatment which he had received.

In December, 1786, the deceased came to Cambridge with Mr. Wilkinson; he then appeared to have recovered his senses; the witness then talked with him about his brother; the deceased said, he would convince him that his brother had not done right, and he called him a hound, a scoundrel, and a villain.

He visited him again in Little London, in February, 1787, and still he expressed as inveterate a dislike to his brother as he had done at the preceding visit.

He visited him again on the 4th of June, he then perceived, for the first time, that the deceased had taken dislike to him, the witness, and that day, at the Devil Tavern at dinner, he used such language to Mr. Jones, if he thought his professions of friendship were vain; that he had found friendship was only a name; that as to principle, and those things, he was persuaded that no such thing existed, and that people, who pretended to be friends, could desert those for whom they professed a friendship, and, towards his brother that day, his expressions in general were harsh.

Mr. Greenwood came to College in July, 1787, he appeared to him then to be quite calm and reasonable, and he hoped he should be able to convince him that his suspicions of his brother were ill founded; when he began to speak to him about the opinion he entertained of his brother, though he was calm before, he turned suddenly round, and, looking very fiercely at him, said, "Let me ask you a question, sir; was it or was it not by your advice that Dr. Budd was called in, and that Price was retained?" Mr. Jones was very much surprised with his behaviour, and told him that it was by his advice Dr. Budd was called in; that then

he grew extremely warm, and abused him for the advice he had given; the witness offered Mr. Greenwood his hand at parting, he refused to give him his hand, and turned away harshly from him; he says, Mr. Greenwood never conversed with him as he thought rationally upon the subject of the quarrel with his brother; when he came to Cambridge, in the month of May, his understanding was upset; that was apparent to every body who saw him and conversed with him.

Mr. Jones, on his cross-examination, says, he does not know how the testator was treated between the 10th of May and the 20th of June; he saw no violence used to him; he saw nothing to render it necessary to put on a strait waistcoat; his complaint was of the manner in which he was treated, this was his constant complaint against his brother, what the other part of his complaint was he does not know; that during the time, after the keeper was removed, he managed his own affairs, and appeared to him to act with discretion; that all that appeared to him to be wrong was, that he could not persuade him that his brother had not behaved ill; he does not believe that those who had not heard of his derangement would have discovered that he had been in such a situation.

Mr. Wilkinson says, he was acquainted with the deceased at College; they took their degrees together in 1784; he saw him after the death of his father, in November Term, 1786; he met him then in his carriage with his brother. In a little time after that, he dined with him at the Crown and Rose; he had heard of his illness, but he did not then know what it was; he staid in the room at the Crown and Rose with him after the rest of the company was gone, as he was anxious to know what it was; he made a great number of inquiries about it. The testator described his illness in various ways: that he had had a fever, had been very ill, that he had been a great deal in the house, and had not been out much; Mr. Greenwood desired him to go home to his chambers, and said he would lay before him a story that would astonish him. He went with him to his chambers, then he told him he had been confined; that he had

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kept a journal which he would shew him; he shewed him the paper altogether, what is called the introduction, and what is called the journal were produced as one set of papers; he also produced some letters which very much surprised him, and he left him in great agitation; he desired that he might meet him again, and discuss the matter with him.

From Christmas, 1786 to July, 1787, he had many conversations with him; he endeavoured to convince him how shamefully he had acted towards his brother. The witness had applied to Mr. Jones, from whom he learned the state of Mr. John Greenwood's mind; he represented to Mr. Greenwood the whole state of his case, and everything that had happened to him; he acknowledged it was so, and then charged his brother as the author of that force that had been used to him; he also charged his brother with having accused him with not feeling for his father; he said, that they had given him brandy and water, in which they had put poison, and that they had put arsenic into his tea-kettle; that he asked the witness whether he would not have him prosecute his brother; that he certainly would prosecute his brother.

The witness was with him at Little London at Christmas 1786, and they went from thence to Cambridge, he watched the testator more narrowly; he behaved to his brother with great sullenness; he never answered him a question if he could possibly help it. The witness then attempted to convince him that his suspicions of his brother were without foundation, but he could not succeed; on the contrary, his prejudices were more rooted, and his antipathy more violent. In a conversation with the testator, in Easter, 1787, the witness told him he distressed him, the witness, and every other man at his table, by his conduct to his brother, and he would visit him no longer unless he altered his behaviour to his brother and sister; after this conversation, the testator seemed to doubt whether his conduct had been correct; he said, "Possibly I may have been wrong, I will alter," and he desired the witness to watch whether he did not alter his conduct to his brother and sister; the witness observed

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reverse ; that he never broke out into any violent expressions ; that he behaved well to other people, but to them, after the death of his father, he behaved with reserve ; when he attempted to persuade him to a reconciliation with his brother, he said, " You are not acquainted with half the damned villainy that exists in this world."

Ann Walker was housekeeper to old Mr. Greenwood, she left the family in August, 1786, she received a letter from Mr. Greenwood, which is dated the 31st of May, 1786. —You recollect that that state of mind is supposed to continue a good while after that time—She says Mr. Greenwood, the deceased, never gave her the least offence he seems to apologize for in his letter. She saw him a fortnight before he went to Lisbon, she called to ask him how he did, he then asked her if she knew anything of the damned brandy and water that was given him at the time he was taken ill ; that if he lived to return, he would prosecute Mr. Higginson, Mr. Livie, and his brother, and he asked if she knew where Price lived.

Mr. Cawthorne is then called ; he says he is acquainted with the family, that they always appeared to live upon good terms together. He called upon Mr. Greenwood a few days before he went abroad at Little London, and took leave of him ; he found him in the parlour with his brother, William Greenwood, and with Abram Greenwood. William Greenwood and Abram Greenwood went out of the room. Then Mr. Cawthorne said to the testator, he hoped he was convinced his suspicions of his brother were ill founded, that he was happy to see his brother with him, and he hoped he was going abroad with him ; his answer was, " He go with a damned rascal !" and made use of very strong language indeed, and was agitated to a degree.

John Turner, the servant says, he lived with the family twenty years, that they lived upon the most friendly and affectionate terms, that there was no disagreement between the brothers ; he was in the room when the father died, the sons came into the room very much affected, Mr. John Greenwood said he would try to be a father to his sister. The next

Day Mr. Greenwood was taken ill of something like an ague,
 Mr. Livie bid the witness to mix some brandy and water,
 and put an egg into it, and carry it up to Mr. Greenwood;
 he mixed it and carried it up, and Mr. Greenwood drank it;
 when he sat down to dinner he again complained that he
 was chilly, his brother then proposed to send for an
 apothecary, the apothecary was sent for, the testator went
 to bed; he asked the witness what he had given him in
 the brandy and water, and seemed to suspect something
 bad was put into it; medicines were sent, the brother asked
 him to take the medicine, he did take it; he then said,
 "You are a villain, you begin betimes;" and he said, he was
 sure there was something poisonous put into the brandy and
 water by his direction. In the morning he was much better,
 he said he had been acquainted with what he had said of
 his brother over-night, and was sorry he had used those
 harsh expressions. The next day he became worse, and
 the same sort of suspicions returned again, and he began
 to be deranged, that he had thought he had seen his father
 in the room, sometimes he whistled, sometimes clapped his
 hands together, and became quite deranged. On the next
 day he seemed cool and collected, and much better in mind,
 but it was impressed on his mind, then, that he was going to
 die; he said he thought he had no occasion to make a will,
 as what property he had would go to his brother and sister,
 they might divide the property between them, only he
 wished to leave a thousand pounds to Mr. Jones, that he
 had no further occasion to make a will. Afterwards, he
 mentioned his suspicions that something had been given to
 him in the brandy and water to take away his life while he
 was confined; the witness did not know of any constraint
 used but what was necessary; as for himself, he told the
 brother that he durst not wait upon him, he had so alarmed
 him with threatenings and imprecations. On the 7th of
 May, he said the deceased had symptoms of the chillings,
 which caused him to be extremely suspicious and doubtful
 of every body; the witness observed that at his dinner he
 cut off all the outside of his meat, and only ate the inside,
 and likewise his bread; he refused eating vegetables, salt-

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butter, and cream, that he filled his tea-kettle for himself, afterwards he had a tin kettle bought, which he kept for himself, and he declared that he had this tea-kettle bought that nothing might be brought to him but what he himself approved. In July, 1787, the witness says he told Mr. Greenwood how uneasy his behaviour to him, the witness, had made him, and asked what was the occasion of it; Mr. Greenwood said the witness need not be surprised, considering what he had done for him. The witness proceeded to ask if he accused him; Mr. Greenwood said, he must be conscious that he had given him something in the brandy and water, and must be assured of his villainous conduct towards him, he knew it was done by the direction of his brother, that he had meant to put a stop to it himself, but upon further consideration he found it would give him more pleasure to make a public example of his brother. The witness endeavoured to defend his brother, the testator said he was convinced of it, it was impressed upon his mind, it could never be erased; if an angel were to come down from Heaven to tell him to the contrary, he would not believe it: he said his friends had treated him with treachery and deceit; he asked the witness if he would go with him to Lisbon; he agreed to go with him. Three or four days before he went, he said, he meant to sell his carriage and live stock at Little London; the witness said he was sorry to hear it, on account of his brother and sister, who were then unprovided with a comfortable residence; he said, that he did not think so, that his sister might go and live with her friends, they would be glad to see her, but as for that villain his brother, he should provide a habitation of another sort for him, and in the meantime he might go about his business. The witness saw the journal in August or September, 1786, and he saw it several times afterwards in his hand, it seemed to engage his attention very much; he heard the cousin, in whose favour the will is made, reading part of the journal to the testator a few days before he left England; he was on the other side the wainscoat; he heard Mr. Abram Greenwood read it; he said, the testator told him he was going to make

his will; he desired him to shut the door and let nobody in; that Mr. Abram Greenwood was with him on the forenoon of the day on which the will was made. The will was made between the 6th and 7th of December, and he went on the 8th.

After they arrived at Lisbon, the deceased told the witness he expected a letter from London, and hoped to hear that that villain his brother was laid fast; he then said, he was not asked anything respecting this account that he gave about the reading the journal on the last trial; that it did not occur to him as material; he said, that it did not strike him that this behaviour of Abram Greenwood, in reading the paper, was at all improper, had he thought it improper, he would have mentioned it. Between July, 1786, and July, 1787, he never expressed the cause of his disgust to witness, till he inquired of him; he said his looks, deportment, and manner, in general, shewed something was amiss; he said, sometimes that his brother was very expert in employing doctors to give him medicines to injure his health, or to that purpose; that he understood what he was about. The witness says, he informed Mr. Greenwood of the conversation he had with his brother, that neither he nor William Greenwood ever proposed to do anything in consequence of that behaviour. He did not insinuate to Mr. William Greenwood, that his master was mad, that he would not insinuate it to him, because he thought it was something material; he says, Mr. William Greenwood certainly knew that Mr. John Greenwood was going to Lisbon; that he was certain Mr. William Greenwood did not dare to propose anybody to go with him to Lisbon, because it would have deranged him, at least his brother would have been extremely dissatisfied if he had proposed it.

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GENTLEMEN,—This long account is the evidence on one side or the other—and the question now is, for you to draw the fair result that ought to be drawn from this evidence—and I can only leave off where I began, by stating to you that the inquiry and the single inquiry in the cause is, whether he was of sound and disposing mind and memory, at the time

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when he made his will; however deranged he might be before, if he had recovered his reason at that time, he was competent to make his will.

And I take it a mind and memory competent to dispose of his property, when it is a little explained, perhaps may stand thus;—having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will.

Gentlemen, The conduct which he held to his brother, certainly is considerably unaccountable—if whenever his brother's name occurred, instantly a fit of delirium had seized him, then I should conceive that he was not competent to make his will; but if his mind remained entire, if he had new raised up prejudices against his brother, though upon improper grounds, yet if they were such prejudices as might reside in a sound mind; it is hard that those prejudices should lead to conclusions unfavourable to his brother; but hard as the case may be, it is better that a thousand hard cases should take place, than that we should remove the landmarks by which man's property is to be decided.

It is for you to look at that conduct to his brother, to see whether it is evidence of a derangement of mind, or whether only an unreasonable prejudice which he indulged against his brother—if it be the last, that did not unfit him to make his last will and testament.

A multitude of instances there have been, where men have taken up prejudices against their nearest and dearest relations—it is the history of every week in the year, and the history of almost every family at one time or other, that harsh dispositions have been made, that unreasonable prejudices have taken place, that one child standing equally near in blood has been preferred to another; and if once we get into digressions of that kind, then we get upon a sea without a rudder—where will you stop—what partiality will

be enough to set aside a will—and what partiality will you give way to, and say the will is good? These are questions which the most correct and acute mind that ever addressed himself to the consideration of questions will not be able to settle.

You are to consider whether his mind was entire to make the disposition—not whether the disposition was whimsical, cruel; what none of you retiring to your own bosoms and collecting your own feelings, would have made—but to see whether it was the disposition of this man's mind, exercising the faculties of his mind at a time when in possession of those faculties.

If you think, that whenever that topic occurred to him, it totally deranged his mind, and prevented him from judging of who the objects of his bounty should be, according to his own will—then the will cannot stand, and then you will find for the defendant; but if you think he was of competent mind to make his will—to exercise his judgment—however that might be disturbed by passions which ought not to be encouraged, then the will ought to stand. It is for you to decide, and the care and attention you have paid, has made it unnecessary for me to say so much as I have said, in addition to the evidence.

Verdict for the Plaintiff.

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January 11th.

Addams moved, for leave to re-examine a witness under the following circumstances. The witness, a solicitor, had retained the proctor in the cause, and considered himself responsible for costs ; the proctor was now ready to release the witness ; publication had not passed.

An interested witness who had been examined and repeated, ordered to be re-examined on motion *before* publication.

Phillimore and *Haggard*, *contra*.

SIR HERBERT JENNER FUST.

The present application is for leave to have re-produced, re-sworn, and re-examined, a witness who has been already examined, and who, as I am informed, is an important witness in the cause. This person is a solicitor, and he has retained the proctor in the cause, and, as I suppose in answer to an interrogatory, has admitted that he considers himself responsible to the proctor for his costs. A release is now tendered to the party, and the Court is moved to permit him to be re-examined, and I see no reason for supposing that this measure has arisen from a disclosure of any portion of the evidence given by the witness in the cause, save as to his having admitted his responsibility for costs. I know of no instance where such a motion has been refused, when made *before* publication ; it is a very different thing when it is made *after* publication, and the reason for the difference is self-evident ; when once the evidence is published and known to the proctor, or to the parties, it would be very in-

1843. convenient if parties could add to the evidence ; but
 January 11th. this reason does not apply to an application before
 publication. The Court is disinclined to shut out
 the evidence of any party, more especially of important witnesses.
 Motion granted.

KEED
 against
 EVERARD.

COURT OF PECULIARS.

1843. WOOLLEY v. MORGAN, *falsely calling herself*
 January 11th. WOOLLEY.

A citation "to appear and answer in a cause of nullity of marriage."
 Held, a sufficient description of the nature of the suit.
 Protest to appearing thereto overruled.

IN this case a citation had issued, calling on Mary Ann Morgan, falsely calling herself Woolley, and the wife of John Woolley, "to appear personally or by proctor, at a certain place, on a certain day and hour, then and there to answer to the said John Woolley in a cause of nullity of marriage."

The party cited appeared under protest.

Addams in support of the protest.

A sentence must be conformable to the citation, and to the libel, and more especially to the citation. There may be precedents in which citations have issued in a similar form to the present, but there is no recorded case where an objection to such a citation has been taken by protest ; it would be too late to take such an objection after appearance. A party

is entitled to know the particular grounds of the offence for which he is cited, *Wright v. Ellwood*. (a)

1843.

January 11th.

WOOLLEY
against
MORGAN.

The *Queen's Advocate* and *Robinson* contra.

A citation must contain the name of the Judge, of the plaintiff, of the defendant, the cause of suit, the time, and the place of appearance. The object of the citation is to procure the attendance of the party cited in this Court; it is analogous to the writ of the Common Law and the subpoena in Chancery. A party may be compelled to answer to matter not contained in the citation, *Barrett v. Barrett*. (b) A citation in a suit for subtraction of tithes never specifies whether the particular subtraction is of corn or of hay; so, in causes of perturbation of seat, the particular acts of perturbation are never set out; in a suit for dilapidations the citation does not mention whether the dilapidations exist in the parsonage house or in the out-buildings. In a suit for defamation, a party is cited "to appear in a certain cause of defamation or slander;" this last is a strong instance, because this Court has not exclusive cognizance of defamatory words, whereas it has in causes of marriage. In the cases of *Ruding v. Smith*, (c) and *Cope v. Burt*, (d) the citations were in the same form as in the present case. *Wright v. Ellwood*, (e) only shews that a party may in a citation elect to bind himself as to the explicit grounds of his charge.

Addams in reply. In neither of the two cases mentioned did the parties cited appear under pro-

(a) 1 Curt. 49.

(b) 1 Hagg. 22.

(c) 2 Cons. 371.

(d) 1 Cons. 434.

(e) 1 Curt. 49.

1843. test. There is no analogy between a citation and
January 11th. the Common Law writ or Chancery subpoena; this
WOOLLEY is a Court of very limited jurisdiction, and a citation
against must shew that the Court is not about to transgress it.
MORGAN.

JUDGMENT.

SIR HERBERT JENNER FUST.

A citation ought to contain the grounds for which, and the matter to which, the party is called to answer; but when nullity of marriage is stated as the *causa ob quam*, this Court having general jurisdiction over all grounds of nullity of marriage, and there being no inveterate practice the other way,—indeed, examples to the contrary are shewn,—I think that this citation is sufficient. I see no inconvenience which can result from the party being compelled to appear to this citation. The case of *Wright v. Ellwood* in no way militates against this; there the party had elected by the terms of the citation to confine the causes of nullity to certain particular grounds. It may perhaps be convenient, in many instances, to set forth the particular grounds of nullity on which the libel is to be founded; but I do not think that it is absolutely requisite to do so. In this case I must assume that the party cited has a sufficient knowledge of the cause for which she is cited to appear.

I think the instances cited at the bar, and particularly the case of a citation in a cause of defamation, bear out this view of the case.

Overrule the protest, and assign the party to appear absolutely.

CONSISTORY COURT OF LONDON.

STONE v. STONE.

1843.

January 18th.

THIS was a question as to the allotment of alimony *pendente lite*. The allegation of faculties was objected to by

In allotting alimony *pendente lite* the reversionary interest of the husband may be pleaded. *Secus*, a mere expectancy.

Addams and *Jenner*, and supported by the *Queen's Advocate* and *Bayford*.

JUDGMENT.

DR. LUSHINGTON.

The whole of the objections to this allegation of faculties are concentrated in the objection to the article, which pleads the presumptive interest of the husband. The general principle, regulating such allegations, is this, the wife is at liberty to plead the income of the husband, and the sources from whence it is derived; with regard to his reversionary property,—and by the word *reversionary* I mean such property as the husband is entitled to for a vested interest expectant on the death of some person, or on the happening of some other contingency,—it is both usual and proper that such property should be stated. I think that with regard to permanent alimony the Court would make a different allotment in a case where the income of the husband was derived from his sole personal labour or exertions,

1843. from what it would do when he had moreover a
January 18th. large reversionary property in expectancy. There-
fore, it does not appear to me, that there is any
objection to pleading the husband's reversionary
property. The article, however, pleads what is the
amount of the property of the father of the husband,
without discriminating between what is reversionary
interest, and what a mere presumptive expectancy
in the husband. A case may possibly arise in which,
under very peculiar circumstances, the Court would
allow the property of the husband's father to be
stated ; this, however, is not such a case.

STONE
against
STONE.

I think this allegation must be reformed, by
pleading that G. S., the party in the cause, is en-
titled — by this I mean legally and absolutely
entitled, not in mere expectancy—to freeholds,
leaseholds, and copyholds, of such and such a
value.

I see no objection to such pleading, it will exclude
all question as to mere expectancies, and allay all
fear as to the father of G. S. being led to make a
disposition of his property so as to defeat any rea-
sonable expectation which his son may have from
his bounty.

ARCHES COURT OF CANTERBURY.

WILLIAMS *v.* GEORGE and NUNN.

1843.

January 20th.

THIS was an appeal, from a decree of the Consistorial Episcopal Court of Saint David's, Carmarthen; the facts of the case are as follows:—

In the year 1835, the parish church of Minever, in the county of Pembroke, being in a dilapidated state, it was resolved, by the parishioners in vestry assembled, that the church should be taken down and rebuilt; and that, to defray the expenses thereof, a rate of five shillings in the pound, on the annual value of the rateable property in the parish, should be made. To this rate Mr. John Moy, a parishioner, was assessed in the sum of 61*l.*; this sum he refused or neglected to pay. Mr. Moy died in the month of February, 1837: at the time of his death no proceedings had been instituted to recover from him the proportion of the rate at which he had been assessed. Mr. Moy, by will, appointed Mr. Williams, (the appellant in this case,) and a Mr. Lewis, his executors; Mr. Williams proved the will in the year 1837. In the month of March, 1841, a citation was served on Mr. Williams, as the sole acting executor of Mr. Moy, calling on him to appear in the Diocesan Court to answer to William George and James Nunn, the then churchwardens of the parish of Minever, in a cause of

The executor of a deceased parishioner cannot be cited in an Ecclesiastical Court, in respect of a church-rate due from his testator.

An appeal Court, in order to prevent a failure of justice, may correct the irregular procedure of an inferior Court; (*e. g.*) by permitting an examination of witnesses, or receiving additional articles, in supply of requisite averments omitted in a libel given in in an inferior Court.

1843. subtraction of church-rate. Mr. Williams having
 January 20th. appeared to this citation, a libel was given in ;
 WILLIAMS whereupon the proctor for Mr. Williams applied to
 against the Court, to suspend all proceedings until a pro-
 GEORGE hibition could be moved for ; the application was
 and refused, and the libel admitted. In September,
 NUNN. 1841, four witnesses were produced on the libel,
 three of whom were sworn and examined, and were
 cross-examined on behalf of the defendant. The
 defendant gave in no allegation ; on his behalf, how-
 ever, two witnesses were produced and examined,
 and one of them was cross-examined. On the 14th
 of October, 1841, the Judge pronounced the con-
 tents of the libel to be fully proved, and condemned
 the defendant in the sum of 61*l.*, and the costs.

From this decree an appeal was prosecuted to
 this Court. On the process being transmitted, no
 depositions were found annexed, and on inquiry,
 the fact of the witnesses having been examined
 and cross-examined *vivâ voce* in the Court below
 was shewn.

A motion was now made to this Court, by the
 proctor for the respondent James Nunn, to permit evi-
 dence to be taken on the libel ; the Court refused to
 accede to this request by way of motion ; whereupon
 the proctor prayed to be heard in the matter on his
 petition, which the Court was pleased to allow of.
 An act on petition was given in, praying, that wit-
 nesses might be examined on the libel, and, if
 necessary, cross-examined.

William George, one of the plaintiffs in the Court
 below, had ceased to be churchwarden in April,
 1841, and he then sent a notice to the proctor em-
 ployed for himself and Mr. Nunn to the following

effect:—"Take notice that John Thomas is made churchwarden in my stead, and you are requested to get his name put instead of mine."—The proceedings in the cause had been continued to be prosecuted in the joint names of Messrs. Nunn and George. Mr. George refused to appear to the citation on the appeal; this Court, on motion, decided, that he was properly made a party respondent, and directed that he should be admonished to appear: this having been done, and Mr. George not having appeared, the Court pronounced him in contempt, and directed his contempt to be signified. Mr. George then appeared, and having purged his contempt, gave a negative issue to the libel of appeal.

The grounds of the appeal were as follows:—

That the citation, in the Court below was issued against the appellant Mr. Williams, only, and not against him and Mr. Lewis, they both being named as executors in the will of Mr. Moy:—"That, on the face of the rate it does not appear, neither is it proved, that any license or faculty for pulling down the parish church of Minever was obtained at the time when the rate was made; that, by the exhibit annexed to the libel, (a copy of the minutes of the vestry at which the rate sued for was made,) it is recited, that a rate of five shillings in the pound, upon the annual value of all the rateable property within the parish, was made upon all the parishioners, towards removing and rebuilding the parish church, by virtue of the 40th section of the 59 Geo. 3, c. 134; and that, it does not appear that the consent of the ordinary, or of the patron, or of the incumbent, or of the lay impropriator, has been

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WILLIAMS
against
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1843. obtained for such purpose:—That, by the 25th
 January 20th. section of the same act, no rate, for the purpose of
 building or enlarging any church, shall exceed one
 shilling in the pound in any one year, or the amount
 of five shillings in the pound in the whole, upon the
 annual value of the property in any parish.”

WILLIAMS
 against
 GEORGE
 and
 NUNN.

Addams, in support of the petition, of the respondent Nunn.

Every Court possesses the power of regulating its own practice; this is a privilege inherent to every Court. It appears, that the Diocesan Court of St David's takes evidence *viva voce*, a mode generally considered preferable to taking deposition in writing: such is not the practice of this Court but, inasmuch as an appeal lies to this Court from the Court of St. David's, and this Court will not examine the witnesses *viva voce*, it must order them to be examined according to its own form. The Court of St. David's was not bound to conform its practice to that of this Court, merely because an appeal may be had to this Court, no inferior tribunal is bound to contemplate an appeal from its sentence. The appellant has himself committed the irregularity of which he now complains.

With respect to the objections to this rate, they are of a nature which can only be taken advantage of by way of plea, and the appellant has not given in any plea.

The appeal proceeds partly on a mistaken construction of the 25th section of the act; the word “not exceeding the amount of one shilling in the pound in any one year, or the amount of five shillings in the pound in the whole,”—mean, the

if the whole sum does not exceed five shillings it may be raised in one year; but if it exceeds five shillings, then it must not be raised all in one year, but by instalments of one shilling in each year, until the whole is raised.

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Phillimore, R., for the respondent George.

Robinson and Jenner for the appellant. An appeal is a matter of right, and a party seeking for a sentence in an inferior Court must take care to obtain it in such a form that he can abide by it in a Court of appeal. The proceedings in this case are not simply irregular, but erroneous; irregularity may be cured in a Court of appeal, error cannot, *Levi v. Ward (a)*. It has been held, by the Judge of the Consistory Court, that a church-rate is a personal obligation, if so, *actio personalis, moritur cum personâ*; if otherwise, it be a debt, the executor cannot be sued for a debt in this Court, *Williams on Executors (b)*. The requisites of the Church Building Act are not pleaded to have been complied with; it was the duty of the parties, who sought to recover the rate, to shew that the act had been complied with. *Blunt v. Harwood (c)*.

SIR HERBERT JENNER FUST.

This is an appeal from the Consistory and Episcopal Court of the Diocese of St. David, and the proceedings, certainly, do not afford a very favourable specimen of the practice in that Court: I never, in the whole course of my experience, saw a

(a) 1 Sim. & Stu. 334.

(b) p. 1230.

(c) 1 Curt. 649.

1843. case in which such great irregularities
 January 20th. committed.

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The proceedings commenced by a subtraction of church-rate, issuing in and calling on Mr. Williams, as the executor of John Moy, late a parish of Minever, in the diocese of S appear and answer to the suit: the having appeared, a libel was given in sued for is 61*l.*, for one rate only; it does seem a very large rate to be sue contribution of one individual parish ordinary repairs of the parish church looking to the libel, it appears, that not for repairing, but for pulling down building the parish church; the rate is the libel, it is in this form: "Be it that we the churchwardens and other of the parish of, &c., do hereby, at our ing, duly convened in pursuance of a several acts of Parliament, and more an act of the 59 Geo. 3, c. 134, ss. 2: ing and enlarging churches, wholly means of rates, tax and rate the parish at five shillings in the pound nual value of the rateable property parish, the same being for and towards rebuilding of the parish church

Therefore this is no common although the sum sued for is large as the share of one parishioner owning the church, it probably is not the purpose of removing and retaining

It appears by the libel, as follows

below, and by the tenor of the sentence, which was pronounced so long ago as October, 1841, that the rate in question was made in 1835: this is a most startling fact at the very outset of the proceedings.

It has been objected, to entertaining this appeal, that the proceedings are not simply irregular, but erroneous, and it is said that, although this Court would be anxious to prevent a failure of justice, from mere irregularities in an inferior Court, yet, that where the whole proceeding has been of so erroneous a character, as in this case, the Court would not be inclined, even if able to do so, to extend any indulgence to the respondents. Now, if the circumstances of this case shall be found to be such as to induce the Court to extend any indulgence, I think the fact, that the evidence was not taken in writing, would not prevent this Court from taking those steps, which it has done in other cases; namely, such steps as will prevent the real justice of the case from being defeated; it is necessary, therefore, to consider what has been asserted on behalf of the appellant, the executor of the party on whom the rate was assessed. It must be remembered, that the appellant has concurred in the irregularity in the Court below in regard to the mode of taking the evidence. Is there then any necessity for this Court permitting witnesses to be examined in support of the original libel? *Prima facie*, there is no reason why this Court should become auxiliary to the respondents, or should be anxious to assist in extricating them from the errors of the Court below.

Now this rate was made in the year 1835; Mr. Moy was then living, and was a parishioner of

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Minever, he did not die until 1837, and, although it is stated, that demands were made for this rate and that he refused to pay, yet, inasmuch as he died in 1837, and his will was proved in the same year by the appellant, and no demand was made against the appellant, as the executor, until 1841;—viz. nearly six years after the rate was made, and four years after the death of the party, against whom the executor these proceedings are instituted, the Court has wished to have heard some explanation why the churchwardens were so negligent in collecting the rate, and why these proceedings were adopted, not against the party assessed, but against his executor and that too after this lapse of time.

When I look to the facts of the case, I find that this is a rate assessed upon a parishioner, no longer living, and that his executor is the party called to pay it. I should have much liked to have had some case, or some principle produced, show that a churchwarden can, in these Courts, sue an executor for a rate due from his testator. The present Judge of the Consistory Court has held, that the obligation to pay a church-rate is a personal obligation; but supposing it to be a debt, clearly it is not recoverable in this Court; it must be sued for in some other Court. The executor was not personally assessed to this rate; he was not even a parishioner of Minever at the time; there could be no proceeding against him personally. This Court has no jurisdiction, at least as far as I am aware, to enforce, as against the executors of a parishioner, the payment of a church-rate,—even admitting that the parishioner, if living, might have been liable to be called on for payment of such rate; and, more especially, if that parishioner was never, when living,

cited in respect of such rate in the Ecclesiastical Court. I know of no principle which can authorize such a proceeding against the executor.

There is another ground of objection,—namely, that the executor has no assets,—*plene administravit*. I am aware that this is rather going into the merits of the principal cause, but, then the present application prays a special indulgence, and although I think, that in furtherance of justice, the Court might grant such indulgence, it would do so only on the terms that there should be no controversy on the real merits.

What are the circumstances of this case?—this is not a rate for repairing, but for removing and rebuilding a church; the sum assessed on this parishioner being no less than 61*l*. The question must be considered whether this is a rate properly made. The 59 Geo. 3, c. 134, noticed in the rate itself, requires, that before any such rate be sued for, certain requisites and consents should be obtained, to wit, those of the patron, of the ordinary, and of the incumbent; but not a single syllable on this point is mentioned in the libel: it is simply pleaded, that the rate was legally made; however the question still is, whether, though not so pleaded, these consents can be proved. If I saw any hope of further information being furnished, I might have permitted an amendment of this libel, with a view to evidence being taken on this point; but the material question would remain, whether, under this Act of Parliament, this rate of 5*s*. in the pound is a legal and valid rate. It has been said, that additional articles may be given in; but I am not inclined to grant any special indulgence in this case, because I am of opinion that in this libel there is no sufficient

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ground for such indulgence. Looking to the amount of this rate ; to the fact that the person proceeded against is simply the executor of the party assessed ; to the delay ; and to the manner in which the suit was conducted in the Court below, I am of opinion that I should not be acting in the furtherance of justice, if I permitted the parties to examine witnesses *vidé voce*. I therefore reject the prayer of this petition.

I reserve the question of costs until the principal question comes on.

At the request of the counsel for all parties, the Court proceeded to conclude the cause, and assign it for sentence ; and, having done so, pronounced for the appeal, reversed the sentence of the Court below, gave the appellant costs of the appeal, but made no order as to the costs of the Court below.

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January 27th.

Appeal, in a matter of church-rate—
Held, Rate properly made on inhabitants of district parish in respect of district church. Churchwardens declared to have been duly elected. Sufficient notice of making a rate. Construction of local, and public Church Building Acts.

NUNN *against* VARTY and MOPSEY.

[See this case reported *ante*, Vol. II., 877.] The defendant appealed from the decision of the Consistory Court.

Bayford for the appellant.

Addams for the respondents.

JUDGMENT.

SIR HERBERT JENNER FUST.

This is an appeal from the Consistory Court of London, in a cause of subtraction of church-rate ; promoted in that Court by Messrs. Varty and

Mopsey, as the churchwardens of the parish of St. John's, Hackney, in the county of Middlesex, against Mr. Nunn, an inhabitant and parishioner of that parish. The usual proceedings were had in that Court; the citation being returned, an appearance was given by the party cited, and the libel, which is very much in the usual form, was given in and admitted without opposition. The answers of Mr. Nunn were given to that libel, and witnesses were examined upon it. Publication was prayed on the part of the churchwardens, and an allegation was then asserted by the proctor for the party cited. That allegation was afterwards brought in, and its admissibility debated before the Chancellor of London, who was of opinion that it was not entitled to be admitted; inasmuch, as if all the facts pleaded were proved, it would not, in his opinion, be a valid defence against the demand which had been made upon Mr. Nunn: it is on the rejection of that allegation that the present appeal is brought.

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The appeal has been proceeded upon here in the usual form; and it is now for this Court, having heard arguments at great length, to decide whether the Judge of the Court below did right in rejecting that allegation, or whether he ought to have admitted it.

Now the allegation consists of *twelve* articles, besides the usual concluding article. It sets forth a variety of objections to the validity of the rate which is sued upon. That rate bears date the 23rd of July, 1840; the amount at which Mr. Nunn has been assessed, and which is sought to be recovered in this suit, is 3s. 4d., the rate being

1843. made at 2*d.* in the pound, for premises in his
 January 27th. occupation rated at 20*l.* a year. It is not there-
 fore the amount which is in question between these
 parties, that renders this case of importance or of
 difficulty; but it is the *principle* on which the rate
 has been made.

NUMM
 against
 VARTY
 and
 MONEY.

Now the objections which are set forth in this allegation, may be classed under six heads. I think they were so classed by the learned Judge in the Court below; and, in point of fact, that classification arises out of the allegation itself. But in order to consider what weight is due to each of these objections, and to see how far each constituted a defence to the suit, it will be necessary, and perhaps convenient, to state briefly the history of this parish.

It appears that in the year 1763, which is the first date referred to in the allegation, because as it is stated, at that time there were certain fees which were paid, and had been paid up to that time, for the old burial ground of the churchyard belonging to the parish, and which were afterwards claimed for the new burial ground; the important point in regard to 1763, is, in order to the consideration whether the same fees which were then paid are now payable, and ought to be paid for the present churchyard. In 1763, it was found necessary, in consequence of the increase of the population of the parish, to enlarge the churchyard; and for that purpose a piece of copyhold land was purchased, and paid for out of certain monies which formed a part of what was called *the unappropriated fund*; which fund is explained in the first article of the allegation to have been created by means of

finer imposed on persons in lieu of compelling them to serve, and as an excuse for not serving certain parish offices. 1843.
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The ground having been consecrated, was from that time used as the burial ground of the parish. The old churchyard was scarcely resorted to for the purpose of burial; and, according to the resolution of the vestry, which is annexed to this allegation, never, except with the leave of the churchwardens, or under particular circumstances. For all the interments in that ground,—that is, in the old burial ground, and in this new burial ground—it is asserted that the churchwardens of the parish were accustomed to receive certain dues for the use of the ground, and also for the tolling of the bell at funerals.

Now in this state the parish continued until 1790. The old church had then become in a state of great dilapidation, it was too small for the increasing population of the parish, and the accommodation of the parishioners; it was therefore thought expedient that a new church should be built, and an additional cemetery or burial ground should be procured; and, in order to facilitate those objects, an Act of Parliament was passed, the 30th of George the Third, chapter 71, by which trustees were appointed for the purposes of the act; and that act contained a variety of provisions, to which it will be necessary for the Court hereafter more particularly to refer. At present, it will be sufficient merely to state, that the effect of that act was to vest the church and churchyard in trustees, during the continuance of certain annuities; in fact, until the incumbrances created by

1843. which consisted, I may say, of the *remaining part*
 January 27th. of the old parish of Hackney. These churches,
 and these parishes, have continued, for ecclesiastical
 purposes, separate and distinct from that time
 down to the present.

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This is the short history of the parish, and of the passing of these acts, it is important for the Court to consider them with reference to five or six of the articles of this allegation. Other objections have been made in the allegation on different grounds, which do not depend very much, or perhaps at all, on these local Acts of Parliament—they are general.

One is, that the rates are not assessed upon the *occupiers* of the premises, but upon the landlords; another is, that the rate is *unequally* assessed; and these do not depend at all on the construction of these acts, on which the main and important question arises, and with reference to which, the difficulties which pressed upon the mind of the learned Judge of the Consistory Court of London, and which have also pressed themselves on my mind, arise. I say, it is on the construction of the Acts of Parliament; and it therefore becomes necessary to consider, in the first instance, what is the effect to be attributed to these local acts; leaving the consideration of those parts which depend on the Church Building Acts, for the separate and subsequent attention of the Court.

Now the first objection that was raised against the validity of the rate on the construction of these Acts of Parliament is, that the rate ought not to have been made by the churchwardens; that it ought not to be in the nature of a church-rate at

all ; but that it ought to have been made by the trustees, and to have extended over the whole of the ancient parish of St. John's, Hackney ; which comprised at that time the present parish of Hackney, and the portions which are called South and West Hackney.

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The second objection was that the rate, if made even by the churchwardens, ought to have been made by the churchwardens of the whole parish.

The third is, that the churchwardens were not duly elected ; and therefore that they are not qualified to sue.

The fourth is, that no due notice of making the rate was given ; and fifth, that the churchwardens had funds which they might have applied to the repairs of the church, and therefore a rate was not necessary.

What then is the effect of the 30th of George the Third, chapter 71 ?

The purpose for which that act was made, may be collected from the title, from the preamble, and the several sections of the act. Now the title of the act is, " An Act for taking down the Church and Tower belonging to the Parish of Saint John at Hackney, in the County of Middlesex, and for building another Church and Tower for the use of the said parish, and for making an additional Cemetery or Churchyard." The preamble is, "Whereas the Parish Church of Saint John at Hackney, in the County of Middlesex, is very ancient, much out of repair, and too small for the accommodation of the inhabitants of the said parish, and it is therefore expedient that a larger Church, in a more convenient situation, with

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proper requisites and conveniences thereto, should be built and provided. And whereas the increase of inhabitants of the said parish has made it necessary to have an additional Cemetery and Burial Ground: therefore, be it enacted, that the Rector, the Vicar, and the Churchwardens of the parish of Hackney for the time being," and the several persons whose names are therein mentioned, "shall be, and they are hereby appointed, Trustees for putting this act in execution."—This is the creation of the trust.

The act goes on to detail the duties of the trustees; but the purpose of the act was to take down the existing church—to build a new church—to add a new cemetery for the parish; and these were the purposes of the act, which were to be carried into effect by these trustees.

The act went on to detail, as I have said, the duties of these trustees, and to vest the freehold of the church, the pews, and churchyard in them. And this is an important point, on which a great deal of argument has been bestowed by the learned counsel who argued the case on the part of the appellant, in order to establish (that I believe to be the extent of his argument) that the freehold of the church being vested in these trustees, they were the persons who were bound to maintain the fabric; to provide the ornaments, as they were also vested in them, and to keep them in repair; although it is admitted that the rates for the purpose of providing the means for the due performance of divine service, would still be a rate on the parishioners. I take that to be the position of counsel; and it is with reference to *this*, that the first objection necessarily

arises. Are the parishioners of the parish of Hackney discharged from *that*, which is, and must now be admitted, after all the discussions and decisions which have taken place upon it, to be the common law obligation of the parishioners to repair their parish church?

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The first thing to be considered then is: Is *this* the Parish Church of Hackney?

Now I think it would be a waste of time, and would hardly be thought necessary by any person, to go into the inquiry whether or no, under the provisions of this Act of Parliament, this church is now the parish church of the parish of Hackney; for, in the act of 1790 it is distinctly pointed out, independent of what I have referred to in the title, that it was to be substituted for the parish church. [The Court read the 13th, 19th, and 20th sections.]

There can be no doubt, on the construction of this act, that this new church and churchyard were substituted for the old church and churchyard, and consequently if that were so, and there was nothing else in this Act of Parliament, the rights belonging to the old parish church would be transferred to this newly erected parish church and burial ground, and the rights and liabilities of the parishioners to the use of the church and churchyard would also have been transferred with it, and whatever *obligation* there was on the parishioners to repair the old church would also fall on them in the new church: and the question therefore which has been raised on this Act of Parliament—on this part of the act at least—is simply this,—*whether, as the freehold was vested in these trustees, the obligation of repairing the church was not also cast on them?*

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Now it will be necessary to consider what is the effect of these allegations; or the effect of the argument raised upon them.

It is argued that the reparation of the church and churchyard arises from custom, and custom only; that it must be construed strictly, and that, as by the general Canon Law the onus and burthen of repairing the church, and providing the ornaments, was cast on the incumbent—the freeholder; so in this case, where the freehold is transferred from him to the trustees, the burthen must follow.

Now it is certainly true, that, by the general Canon Law, the burthen of repairing the church does fall on the incumbent of the parish; and therefore it must be shewn that there is a difference in this respect in the law of England, from that of many other countries; and I think there was a great deal of industry bestowed, and a great deal of learning displayed, (a) in order to establish that at one time at least in England, the repairs of the church were thrown on the incumbent, and that it was only by supervening custom that he was relieved from that burthen, which was cast, as far as the body of the church was concerned, on the parishioners; the reparation of the *chancel* still continuing in the incumbent or rector of the parish.

Now in support of that argument, reference was made to ancient records—to writers of estimation and of repute, in order to establish the fact, that at least at one time, as to *repairs*, that was the law of England. But it seems to be unnecessary very much to enter into that question, because it cannot

(a) A summary of the whole of the argument on this point will be found in Mr. Rogers's Ecclesiastical Law, p. 163, n.

be denied, and it was even proved by the very authorities referred to; that as early at least as the beginning of the 11th century, a custom prevailed in England, that the church should be repaired by the parishioners. At the time of Canute the custom existed, (supposing that even to be the origin of the custom), that churches were repaired by the parishioners, and not by the incumbent; and as this has now continued to be the custom—not prevailing in any particular city, town, and district, but universally through England, it can hardly be considered as a custom; but it is rather entitled to be considered, as was stated by Lord Chief Justice Tindal, in delivering the judgment of the Exchequer Chamber in the Braintree case, as the *common law of England*; for, in point of fact, the common law of England, *lex non scripta*, is nothing but custom: and when it is once proved that the general law, the universal law of England, is, that the church shall be repaired by the parishioners, it can hardly be considered that it is giving a fair description of it to say it is a *custom*, and to be construed strictly.

A claim of any particular place to be exempt from the obligation imposed by the common law may be fairly called a *custom*, and may be maintainable, supposing it to have a reasonable foundation or a reasonable origin; but the general law of England, the common law of England, is *that* which must prevail, unless it can be shewn that the burthen, which that common law imposes on certain individuals or certain places or districts, has been modified or altered by some special enactment or by necessary implication. Now I cannot consider it

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and the churchyard was to remain as consecrated ground. The monies arising from the sale of the materials, and the rent or sale of that part of the new ground not required for the cemetery, were also to be applied to the purposes of the act. The trustees were also empowered (section 24) to let certain pews in the church to schools in the parish, at certain rents, and these rents, during the continuance of the rates, are to be applied by them to the purposes of the act; and after the cessation of the rate—after it shall become no longer necessary to provide for the payment of the interest of the money borrowed, or the annuities on which it was borrowed, are to be applied in aid of the church rates of the parish. The duties therefore which were imposed on the trustees by this act, were those which I have here enumerated; and the monies which were to be procured by these different modes—by the letting of the pews, and by letting such part of the churchyard as was not required for the church or for the burial ground, and by the sale of the old materials, were to be applied for the purposes of the act.

But besides this, in order to enable the trustees to meet the expenses, which must necessarily arise in carrying this act into execution, they were empowered (29th section) to *borrow* money; and the preamble of that section of the act may perhaps not be unimportant, because something turned upon it in the argument, in reference to the sums that were paid to the churchwardens in the new cemetery for burials there.

Now the 29th section is to this effect, “that as the aforesaid dues and duties (that is the dues and duties

payable to the churchwardens, under the previous section,) *will* be insufficient for the purpose—not *may* be insufficient—but *will* be insufficient; assuming the fact that they will and must be insufficient; it shall and may be lawful for the said trustees, by writing under their hands, to make an assessment or assessments, rate or rates, on the occupiers of all lands, houses, &c. It is unnecessary to enumerate all the particulars of the property on which that assessment is to be made, “all which rates and assessments are hereby vested in the said trustees; in trust to be applied by them for the purposes of this act, and shall take place from the 21st day of March, 1790, and continue for and during such time as any of the moneys to be borrowed on bond, or raised by the sale of annuities upon the credit of this act, (as herein mentioned,) shall remain owing or have continuance and *no longer*.”

This shows that the purpose to which these rates were to be applied, was to discharge these bonds and to pay these annuities. The rates were to continue only so long as it was necessary to pay these annuities, when they ceased, and all the bonds were discharged, the trusteeship was to cease; and the property was to be vested in the vicar and churchwardens of the said parish for the time being, in trust for the inhabitants of the said parish.

Now nothing can be more clear on these several sections than *this*, that the duties of the trustees being such as I have mentioned, the monies raised by them were to be applied for the purposes I have here described, viz., to the purpose of the redemption of the debts which had been incurred, by carrying into effect the purposes of the Act of Parliament.

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1843. It is quite impossible it should be for any other purpose, according to my reading of this section of the act.

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It is true that in the 29th section of the act there is a reference made to certain dues and duties payable to the churchwardens of the parish; and the dues and duties which are to be received and payable to the churchwardens, are set forth in the 23rd section, which enacts, "that whereas the churchwardens of the said parish have received certain accustomed dues and duties at funerals or interments of the dead, for the use of the ground in the present church or churchyard, and for tolling a funeral bell in the said church; be it further enacted, that the said churchwardens shall continue to demand, take and receive such, and the same dues and duties at funerals or interments of the dead in the said new church and churchyard, and for tolling a funeral bell in the said new church; which dues and duties when received, shall be applied by the said churchwardens in aid of the church-rate of the said parish."

The church-rate of the said parish never can make the rate to be raised by the trustees for the purpose before mentioned.

All I can collect to be the meaning of this 29th section is, that whereas it is possible the expense will be greater than can be defrayed by the dues and duties which could arise by the use of the ground in funerals and interments of the dead, some other means must be devised for meeting that expense. The funds of the parish—the ordinary church-rate of the parish, which is that which would under common circumstances be resorted to for the purpose of increasing church accommodation of the parishioners, would be utterly insufficient for the

end. It cannot be expected, out of that common church-rate, that the ground could be purchased—the church built—the burial ground made and consecrated,—and ornaments of a proper description provided,—and therefore another fund is to be created; and the mode of creating that fund is by empowering the trustees to borrow money for the purposes of the act, as distinguished from that of an ordinary church-rate. And when it is said in the 24th section, that the trustees may take certain rents for pews erected for the accommodation of schools in the neighbourhood, that means, in consequence of the increased expenditure made necessary in order to provide extra accommodation which is to be given to these schools, in a certain degree, to the prejudice of the general body of the parishioners, it is but reasonable, that they should contribute to defray the expense which would necessarily be incurred by the erection of these galleries for their accommodation; during such time as the debt should remain which had been incurred by the removal of the church and so on. But when that should cease, it is still reasonable that a rent should be paid for these pews, and that such rent should then be paid to the churchwardens in aid of the church-rate.

Now it is quite impossible to read the act or consider the real meaning and intention of the Legislature, in respect of this act, and not to see, that the trustees would have misappropriated that money if they had applied any portion of it to purposes for which an ordinary church-rate is collected.

The purpose for which they are to raise these sums is for payment of the annuities, for the liquidation of the bonds on which the money had been

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1843. borrowed; therefore, if they had applied them to-
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 NUNN would have misappropriated the sum raised; it was
 against ordered to be set apart for purposes other than those
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 and the trustees had no other funds out of which they
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The view the Court had taken of this case is strongly fortified by the fact that it is nowhere alleged that at any time since 1790, when this trust was created, were the trustees applied to for the purpose of repairing the church. Nor is it any where suggested that from the year 1790, or since the time when this church was consecrated, church-rates have not been made in this parish. Indeed, I find by reference to the exhibit, annexed to the allegation, which is in supply of proof by Mr. Nunn, that the churchwardens' accounts were continually exhibited before the vestry; and were examined as late as in 1840 for the purpose of seeing what sums had been received by them, on the church account. That church-rates were periodically made is not denied in point of fact a church-rate must have been made for the purpose of keeping the church open for divine service. But these dues and duties are to be paid to the churchwardens, in aid of the church-rate not to go in entire liquidation of the rates, but in aid of the rates, which the churchwardens would be legally empowered to raise.

Therefore, on this part of the case I am clearly of opinion the burthen of repairing the church was not transferred either by the transfer of the freehold to the trustees; or by the direction of the act that these dues and duties should be paid to the churchwardens.

This act was, most undoubtedly, a very important act in regard to the alteration made in the parish with respect to the church itself—the churchyard and the building of the new parish church; and it seems to me that the act, when it comes to be considered in all its bearings, leaves no doubt what was the real intention of the Legislature with respect to this church. This church and churchyard were for the use of the parishioners—the trustees had a *qualified interest*; they were to set out pews for the vicar and churchwardens, and to construct the new chancel; *all the rights of the rector were to remain as they were in the old church*; in short, it was vested in these persons as trustees for the use of the parish, not for their own advantage or benefit; but as trustees. Although it may be, perhaps, somewhat difficult to assign any reason why it was thought necessary to vest this freehold, still more to vest the ornaments in them, yet the mere fact that it is so vested is not sufficient to relieve the parishioners from the burthen which is thrown on them, and which they bore while the freehold was vested in the incumbent of the parish. For the freehold is in the incumbent of the parish and not in the incumbent and parishioners; although the use of the church is for the benefit of the parishioners, who are entitled to use and occupy it.

Therefore, on that part of the case the Court will say no more except that the view which is now taken of the duties of the trustees, and of the purposes for which the money is to be applied when it has been raised by the rates, is still further confirmed by the two latter local acts; namely, by the 35 Geo. 3, s. 23, and that of 1803. The monies are to

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 reason of these additional sums.

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By the first act, rates to the amount of five-pence in the pound ; by the second act two-pence—seven-pence in the pound in the whole, were to be raised ; and it is enacted, that if any surplus shall arise of the rates and assessments to be made or assessed under, and by virtue of the said act, after payment of the annuities, it is to be applied to liquidate the debts which had been incurred under the former act. All this goes to fortify the view which the Court has taken of the construction of the act ; that these sums of money, so raised by the trustees, were to be appropriated, solely and alone, to the redemption of the annuities ; and as soon as that purpose was accomplished, then the church was to be in the minister and churchwardens for the benefit of the parishioners.

I have deferred the consideration of the application of the dues and duties, mentioned in the 23rd section of the act, until the subsequent part of the case ; because they arise, and can be more conveniently considered, under that article of the allegation which states the amount of the rate to be *excessive*.

Now another question arises under a different system of law.

Between 1793, and the year 1824, two other Acts of Parliament were passed. Those are generally known as the Church Building Acts. The first of these is the 58 Geo. 3, c. 45, and the second is the 59 Geo. 3, c. 134 ; and the purpose of those acts

was to afford additional church accommodation for populous parishes.

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Now these two acts have, at various times, received what have been called amendments ; that is, acts have been passed in order to explain and to render them more effectual. Whether that end has been accomplished by these more recently passed acts, is a question upon which the Court is not at present called upon to enter. I have reason to believe some effectual amendments will be soon made to these acts ; that there will be an act further to amend or to render them more effectual by consolidating all their enactments ; and I hope also to remove all doubts and difficulties which may arise on their construction : at least there is every reason to hope such will be the case in the hands to which it has been entrusted ; (a) and that no additional difficulty will be created in the construction and in the application of these Acts of Parliament.

Now the parish of Hackney, as I have already stated, was of great extent and population ; it was extremely important therefore that any provision that might be made by the Act of Parliament for the promoting the building of additional churches in populous parishes should be applied to this parish ; and accordingly we find, between the passing of this act and 1824, it was deemed advisable to divide this parish of Hackney into *three* separate and distinct parishes ; and there is authority given to the commissioners by this act of the 58 Geo. 3, to carry it into effect. Accordingly it was so divided into

(a) The Court was understood to refer to the Judge of the Consistory Court of London.

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the parish of *South Hackney* and *West Hackney* ; leaving the parish of Hackney, so called, as it before stood by that name, or the parish of *Saint John*, or it may be described as *Hackney proper*.

Now the question that arises on this part of the case is, *whether* by the separation which has taken place, any alteration is made in the mode of assessing the church-rate. Whether, as in 1790, and up to 1824, the assessment was made upon each and every part of this parish, comprising as well South and West Hackney, as Hackney proper ; whether by this division any alteration has been made in this respect, and what alteration has been made, (the rate now before the Court being made by the parish of Hackney, properly so called, on the inhabitants of that parish) this will depend on the consideration of several of the sections of the acts.

Now the first section to which the Court will refer is the 16th ; because that is immediately applicable to the present case. It is that, under which the parish of Hackney, as it originally stood, has been divided into three distinct parishes, by the separation of two portions from that of which the parish originally consisted.

Now the 16th section directs that in every case in which the commissioners should be of opinion that it will be expedient to divide any parish into two or more distinct and separate parishes for all ecclesiastical purposes whatever ; “ it shall be lawful for the said commissioners, with certain consents therein mentioned to make such division.”

The effect of such powers is to completely sever and separate these portions of parishes from the old parish. Two new, separate, and distinct parishes

have been created in this case by the commissioners, under this 16th section of the Act ; and the effect of that, standing simply by itself, necessarily would be to leave the parish of Hackney—that part of the parish of Hackney which is properly now so called—as it was before it was dismembered of certain portions which originally belonged to it, and which portions are, as if they had never formed a part of the parish for all ecclesiastical purposes ; (I am now confining myself to the consideration of the 16th section of the act only,) it was as if they had never existed as part of the parish of Hackney from 1824, when the separation of the parish was final and complete. Whether by resignation of the minister, or in what other manner it was rendered effectual is immaterial, because it is agreed on all hands they then became separate and distinct ; and, as I have already stated, those portions of the parish so severed and dismembered from the old parish, were as if they had never formed a part of it.

Now, that I am right in stating this I think is quite clear by the latter section of the act, namely, with respect to the glebe lands, tithes, moduses, and endowments ; they no longer form a joint fund to be appropriated to the maintenance of one minister ; those portions which arise within the separated parishes, are each to go to their respective ministers. Consequently, on the construction of the 16th section, the portion which arises within the part of the parish which still remains the parish of Hackney, was to go to the minister of that parish.

When, in 1824, this separation took effect, the inhabitants of those portions of the parish which are now called South Hackney and West Hackney,

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were no longer at liberty to resort, and they had no right to resort, to the parish church of Hackney for the purpose of receiving divine offices; they had no claim on the minister of that parish more than on the minister of any other parish in the diocese of London: the districts were separated completely, and set apart as distinct from this parish;—at least for all ecclesiastical purposes.

In construing this section of the act, I take no consideration of the local acts; because this is a general act, which had no reference whatever to these or any other local acts—it was general for the whole kingdom, as to the mode in which parishes were to be separated from each other.

There may, under particular Acts of Parliament, be provision made, by which under certain circumstances the parish may still be considered as part of the original parish, but not for ecclesiastical purposes; for all ecclesiastical purposes whatsoever, they are separate and distinct.

Now it has not been contended, indeed it was admitted, and properly admitted, that if this 16th section stood alone, it could not be contended that the whole of the parish ought to contribute, (that is, South Hackney and West Hackney) to the reparation of the church by the church-rates of the parish of Hackney. It was necessarily admitted that they would be exempt from contributing to the rates by the 16th section; but it is said, by the 31st section of the act, the hands of the Court are tied, for the 31st section has in effect explained what is meant by *ecclesiastical purposes*; that it has limited the general terms of the 16th section, by those which are used in the 31st section; and it cannot be denied but that considerable difficulty does arise

by the *limitation* which is contained in this 31st section. For what is that 31st section? It is this: "That no divisions of any parish, or extra parochial place, whether it be divided into separate parishes with the consent of the patron and bishop of the diocese, or into distinct parishes, nor anything in this act contained in relation thereto, shall affect, or in any manner be construed to affect, any parish or extra parochial place so divided, or the persons residing therein, in any other respect than in this act particularly provided, or in any manner to apply to any poor or other parochial rates which may be raised in the parish, or extra parochial place so divided, or in any such separated parish or district parish, or to the maintenance or relief of poor persons, or to any title or claim to such relief, or to any powers relating to any such rates, or holding vestries, or appointment, or powers of parish officers, or any such relief or claim thereto, or to any Act or Acts of Parliament, or law or custom relating thereto."

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So far therefore in all these particulars the persons resident in this parish are not to be affected; they are to be liable to the parochial rates as they were before, nor are they liable to be affected in any other degree as to rates, "save," then comes the limitation, "save and except as to church-rates."

Supposing the act stopped here, church-rates would be excepted—they would be left to the general operation of the 16th section of the act, by which being created separate and distinct parishes, they would be liable to the repair of their own church as a necessary consequence; but then, unfortunately comes a still further *limitation*, "in so far as the same are regulated by the provisions of this act."

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Now there is a limitation upon a limitation ; an exception upon an exception ; and it is upon this second exception, engrafted upon the first, that the difficulty of the case arises ; because, as was observed by the learned judge in delivering his judgment in this case in the Court below, “ it was to be expected, and it was a reasonable expectation, after stating what was the exception and what the limitation, so far as the same are regulated by the provisions of this act, that in some part of the act would be found some special enactment, by which it would be declared on whom the repairs of the churches were to fall upon a division of the parishes ; whether the original parish, or those separated from the original parish into separate and distinct parishes.” It was undoubtedly reasonably to be expected that such a provision would be found, and yet it is true, that on looking through the several sections of the act, and that of the 59 Geo. 3, which followed, and the other acts, there is no special provision made for this particular case ; that is, for the repairs of churches separate and distinct of one parish—there is no special enactment in terms. But it is a question, and is a point which the Court is called upon to consider, whether the Legislature has not expressed all that it meant to express—whether it has not sufficiently shewn, by necessary implication, what was the intention, and what was the purport of the act ; and if in words it does not contain a special provision “ that separate and distinct parishes shall repair their own parish church,” is there not in the Act of Parliament sufficient to shew that separate and distinct parishes, being so created by the act, were to repair their own churches, without any special words ?

It is clear, and must be admitted that there might *have* been a much more direct mode of doing it than by compelling the Court to put their interpretation on the act, which, in order to effect the intention of the Legislature, the Court must do ; it would be far more satisfactory to the Court, and to persons who have to act under this statute, if there had been an *express* provision. But is it absolutely necessary that there should be ? When once the Court has ascertained what the intention of the Legislature was with respect to the repairs of these churches, it is the duty of this Court, and of all Courts who are to construe Acts of Parliament, if it can do so without evidently distorting the words of the act, to put such a construction on them as will best effect that which it has satisfied itself was the real intention of the Legislature.

Now, then, the 70th and 71st sections of the Act of Parliament are those which bear upon this part of the case. "That the repairs of all such district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district ; in like manner as in case of repairs of churches by parishes."

It assimilates the churches of *district* parishes, as to repairs, to the repair of churches in undivided parishes ; and not only so, but goes on to declare *why* they are to be so, and in what way they are to be considered as liable to the repairs. "And every such district shall be deemed in law a separate and *distinct* parish for that purpose ; and the repairs of all chapels, not made district churches, shall be made by the parish in or for which the chapels shall be built."

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Why, then, this section declares that the repair of the district churches shall be made by the district and for that purpose it shall be considered—What? Why, a separate and distinct parish, as by the 16th section of the Act of Parliament separate and distinct parishes were created.

The very words used in the act are here made up of—“a separate and distinct parish.” Can anything be more plain than this, that the Legislature must have considered, that when a parish was created into two or more distinct and separate parishes, each parish must be liable to all the incidents of a separate and distinct parish; and by assimilating the district churches to the separate and distinct parishes for the purpose of repairs, does it not speak as plainly as language can do, (short of express terms, that they shall be repaired in the same way;—that these district churches shall be precisely on the same footing as separate and distinct parishes. And therefore district churches are to be considered as separate and distinct parishes for the purpose of repairs.

Again, the 71st section of the act, “That every such district shall remain nevertheless subject, for twenty years, to be accounted from the day upon which the district church or chapel shall be consecrated, to the repair of the original parish church and be deemed part of the original parish for the purposes of such repairs.”

Why here again the district church was not to be relieved altogether from contributing to the repair of the original church. For twenty years it is to continue subject to those repairs; and for the purpose of those repairs it was to be considered as pa

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who is to be affected by the act of parish officers, has a right to vote in their election, so these parties who are to be affected, who still remain a part of the parish for *certain* purposes, which these churchwardens are to carry into execution, are entitled to have had notice ; and no notice has been given.

The churchwardens have undoubtedly other duties to perform, under the local acts, as churchwardens of the parish of Hackney, than those which relate to the church and churchyard, or performance of divine service ; because they are trustees for carrying into effect the purposes of that Act of Parliament ; and under another local act they are trustees for the relief of the poor : and it may be a question whether these persons so elected for the parish of Hackney, by the inhabitants of that part of the parish of Hackney, which I have called the old parish of Hackney—whether, being elected by those persons only, they are properly qualified to act as churchwardens under this local act : a question may arise whether they are legally appointed. *That* is a question not for this Court to determine—this Court cannot determine on the qualification to act as trustees under this act.—It cannot enter into the question whether they are capable of acting under the poor law act relating to this parish,—those questions are for other Courts to determine. If they so claim to act in virtue of this election, it will be for other Courts on the construction of all these statutes—to decide whether they are or not qualified so to act—whether what they may do in that character under the Act of Parliament, is properly done by them or not.

The *only* question here, is one put by the Judge

in the court below—are they the churchwardens of the parish of Hackney for *this purpose*—for the purpose of this rate, which does not profess to bind any other person than an inhabitant of this parish?

Now I am of opinion that they are properly the churchwardens of this parish—it is provided by this act, that all churches and chapels, which are erected under the provisions of this Act of Parliament, are to have power of electing churchwardens; this necessarily infers that the parish still remains with that power—it is not affected at all—it is left untouched in that respect; it forms the parish—it constitutes the parish of Hackney as it originally stood—the election of the churchwardens for the purpose of church matters and ecclesiastical matters is quite sufficient, as it appears to me, if made by the inhabitants of this part of Hackney, and enables them to act in that capacity for ecclesiastical purposes—the Court has nothing to do with the maintenance of the poor, or the provisions of the act as for making other rates—the *church-rate* is that which is sued for in this case, and the church-rate is that alone on which this Court can determine. It is quite sufficient that these churchwardens have been elected for this parish of Hackney, in order to enable them to sue upon *this* rate, which is the question now for the decision of the Court.

The section of the act to which I refer in the 58th of George the Third, the section with respect to the election of churchwardens is the 73d. [The Court read it.]

So that for every church and chapel appropriated under the provisions of this act, two fit and proper persons are to be chosen; that is, for these parts of

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the parish of Hackney, South, and West Hackney churchwardens are to be elected—fit and proper persons are to be elected to do all things necessary for the repairs of the church; therefore they would be compellable to repair their own churches under the provision of this Act of Parliament.

But it was not necessary to provide for that part of the parish which still remained: they would not be deprived of the right of electing churchwardens for their own purposes without special enactment or necessary intendment. There is none such in this act, and therefore they continue in the same manner to elect their churchwardens as every other parish elects its own churchwardens for its own ecclesiastical purposes—for that district which remains as part of the old parish. It has not been severed, or dismembered, or transferred in any way whatever; it continued under the same rights, the same church, and the same management as it had originally.

On this part of the case there is no doubt that the churchwardens were properly elected by that part of the parish for which they were chosen, and that they are therefore qualified to sue on this rate. Whatever may be the construction put on the law act with respect to the rates for the poor or assessments for the trustees' rate, as distinguished from the church-rate, they were qualified to act as other churchwardens in the repairs of the church, for calling the vestry together for the purpose of making the rate, and for suing for the rate, as against those who might refuse to pay, supposing it to be otherwise properly made.

Well, then, this would dispose of as well the

third as the fourth objection, namely, that the churchwardens were not duly elected and no due notice was given of the election. 1843.

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Holding that they are churchwardens of the parish, and if elected by the parishioners that they are qualified to sue, on this part of the case no notice was required to be given of the election of these churchwardens to the other parishioners for the purpose of the church-rate; whatever may be the defective qualification or want of qualification as to the other parts of their duty to be performed under the provisions of this local Act of Parliament.

The next question which arises is with respect to the *necessity* of the rate.

It is contended that the rate is excessive, that there are several items in the estimate which was laid before the vestry which ought not to have found their way into this estimate.

When I first read the allegation it struck me that it was very vaguely worded—that nothing was pointed out as to the items which ought not to have found their way into the church-rate—or in what degree it was considered excessive; but the explanation given of that was, that the rate was excessive because the churchwardens, if they had properly applied the dues which they were entitled to receive under the provisions of the local Act of Parliament, would have had sufficient funds to have obviated the necessity of having a rate made at all.

Now the funds which it is supposed the churchwardens had in hand were to arise out of certain dues and duties which were to be paid to them under the provisions of the local Act of Parliament

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of 1790, namely, for interments in the new churchyard and also for tolling the bell at funerals.

Court read the 4th, 5th, 6th, and 7th articles of the 2d *Curt.* 879.]

Now these are the three articles of the allegation which refer to this particular point—and with reference to the first of these, the 5th, the declaration of the Act of Parliament is set forth—that the churchwardens were in the habit of receiving for the churchyard, and for that which may be called new burial ground, certain fees for the burial of the dead, and the tolling of the bell, and at certain rates that they were empowered to receive these, and from time to time funds had been raised or collected—by whom, or to whom they were paid when they were collected, or at what time, is not stated—it is not stated in any one part of this allegation that the churchwardens ever received rates since the year 1790, whatever they may have done before; and it is not pleaded that these churchwardens had received any such rates, or that their predecessors had ever received any such rates, trying it back from 1824 to 1790, when the alteration took place in the substitution of this church for the old church; and therefore I think the Court is perfectly justified in stating, that this is a loose and indefinite plea; and if any thing is to arise out of it, it should have stated when, and at what time those sums had been received, and by whom, or for whom, they were received, whether by the churchwardens. Annexed to this allegation, in supply of proof, is a copy of the report which was made by the parish; or by the committee appointed by the parish to investigate the matter. This is a committee appointed by the vestry of

25th July, 1840, two days after the rate sued upon in this case bears date.

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The report is this : " The nature of the reference made to your committee is in a great degree suggested and controlled by the Act of Parliament, the 30 George 3, chap. 71, under which it arises ; and particularly by the 20th, 21st, and 23rd sections of the act ; they find but little evidence to prove what were the precise receipts of the churchwardens, in respect of interments in the church and churchyard, previously to passing the act of 1790 ; but they think it fair to presume that the scale of 1690, a copy of which forms part of the Appendix to this report, was usually, though not universally acted upon.

" Both because they have seen no evidence of any other scale of charging, with the exception of 10s. paid to the churchwardens from time to time for the use of the ground ; and because they find upon the minutes of the select vestry, under the date of Easter Tuesday, 1801, a resolution that the scale of 1690 should be registered on the minutes as a memorandum of the old usage in respect to burials, &c."

I think the committee came to a very fair conclusion, that the fees authorized by that table of 1690, were those which were received in the old churchyard.

They also state they found, that in 1759, " 29th September, it was resolved, that no stranger be for the future permitted to be buried in the churchyard, without paying for the ground, as well as for the bell. That 10s. be paid for the ground in the churchyard, for burying every person who shall not have a legal settlement in the parish, exclusive of

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the fees paid for the bell. That double fees for the burial of every person who shall not be legally settled in this parish shall be paid.

“Secondly : in respect of what were these fees receivable. It appears clear that the fees for bell-tolling were received by the churchwardens ; and your committee also find in the churchwardens’ accounts, subsequently to 1760, numerous entries in the quarterly receipts, with which they debited themselves in respect of burials, and for the ground ; your committee find that the aggregate amount at that period generally averaged from 60*l.* to 70*l.* per annum. They have discovered no evidence to shew that the churchwardens received value for any place or species of burial, other than those which occurred in the church, (exclusive of the high and low chancel) and the parish vault, which appears to have been in the churchyard, and for the use of the ground in the churchyard as before stated, and also for the tolling the bell. With reference to the third question, they think that the minutes of the open vestry for the year 1763, will give the vestry considerable information. It appears, that in or about the year 1763,” (and this forms the groundwork of the allegation in the first instance) “it was considered expedient to enlarge the old churchyard, and accordingly a piece of land of copyhold, (tenure) was purchased out of the unappropriated fund, or fund created by the receipt of fines imposed by the select vestry upon persons in lieu of their serving certain offices in the parish, and after considerable difficulty the ground was consecrated by the bishop of the diocese. And on the 26th November, 1763, it was resolved, that the Rev. Mr. Cornthwaite,

during the pleasure of the parish, have leave to grant vaults, monuments, and tombstones, to be made and erected in the new churchyard; and he being present, returned the parishioners his thanks for that liberty."

That is the additional copyhold ground which was added in 1763. "And at the same time it was resolved, that no bodies be deposited in the old churchyard without the leave of the churchwardens for the time being, except persons who have family vaults or stones therein. It further appears, that after the enlargement of the churchyard, and the passing of the resolution, just quoted, to close the old one, the part so added became for most practical purposes the churchyard of the parish, and continued so to be, until the passing of the act, and the subsequent addition of the present churchyard. A diligent examination has been made of the books and documents relating to the burial customs of the parish, about and subsequent to the period of passing the new Church Building Act, but it does not appear that there are any receipts or acknowledgments in the churchwardens' accounts, in the interval between 1791, the period of passing the act, and 1801, when the resolution of vestry respecting the new scale of fees was passed; to shew what the customary charges were."

So that between 1791 and 1801, a period of ten years, it does not appear that the churchwardens of the parish had received on account of the parish, and debited themselves with any sums of money for burials in the churchyard; there is no evidence to shew it in the churchwardens' accounts; *this is the proof adverted to by the appellant himself,*

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and no evidence of any such receipts by the churchwardens during those ten years.

It then goes on to state, " Entries appear under the date of 1770, and subsequently in the churchwardens' accounts, which shew that money was not only received for the bells, but for the ground."

When did that cease? there are no entries to shew that between 1791 and 1801, any monies were received, and the utmost extent this would shew, would be, that from 1770, and subsequently to 1791, that is, for a period of twenty-one years, money had been received for the bells, and for the ground also; " and as this was after the date of the consecration of the intermediate or then new churchyard, it seems to establish the fact, that the churchwardens did receive value for the ground in that churchyard."

There was nothing, however, to shew that they received any fees for interments for the use of the ground, between 1791 and the year 1801, and nothing afterwards appears in the report, or in any of these papers to that effect.

Now then, the committee conclude their report by this summing up: " The result of this investigation appears to shew, that in the new portion of the old churchyard, up to the period of passing the Church Building Act, the vicar enjoyed the privilege of granting vaults, monuments, and tombstones only during the pleasure of the parish. That the bell-money was received, as now, by the churchwardens, and carried to the church-rate account; that they also received a fee of 10s. for the use of the ground from all strangers, or persons resident, and not having a legal settlement in the parish;

but whether the payment of this fee was limited to such persons only does not appear. The fees paid for the use of the ground in the old church, and in the parish vault, which was in the churchyard, were also received by the churchwardens."

Now this only brings it up to the passing of the act of 1790; at that time certain fees were received, and authority given to the churchwardens to receive the same fees, whatever they might be.

There is nothing to shew that these fees had at any time, after the passing of the act, been received; whether by the direction of the vestry, or by any arrangement made with the vicar, in order to compensate him for loss he sustained for burials in the church, and certain parts of the churchyard, which were prohibited by the act of 1790, or not, may perhaps appear by subsequent consideration of the scale of fees which was sanctioned by Lord Stowell, then Sir William Scott, in 1801, when chancellor of the diocese of London.

Now, annexed to the report in the Appendix, is the scale of fees in 1690, when Doctor Newton was chancellor of London; and looking through this table of fees, I find very little that applies to the churchyard in its present state, for fees for the use of the ground. In this table, I find that for burials in the high and low chancels, there is a fee to be paid to the churchwardens, for the great bell, of 13s. 4d., and nothing to be paid for the ground. In the north and south sides of the chancel, the churchwardens are to receive the sum of 1*l.* for the use of the ground; and in the parish vault they are to receive 2*l.* for the ground; and 13s. 4d. is to be paid to them for the great bell. I do not find any-

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thing stated to be received by the churchwardens for the ground in the churchyard. All that I find is: "To the churchwarden, for the great bell, 13s. 4d.; for the fifth bell, to the churchwarden, 6s. 8d.; the fourth, 4s.; the third, 2s. 6d.; the second bell, 2s.: and with the little bell, nothing is to be paid to the churchwardens.

There is nothing in this table of fees which would enable the Court to see that there was any fee to be paid for the use of the ground, inasmuch as it does not appear that there was any vault called the parish vault in this new churchyard, *for which alone, except in particular parts of the church, fees are to be paid*; and by the act of 1790, (sec. 17,) all burials within the church, unless vaults are built under it, are prohibited; and therefore no fee is to be taken; they are not to be paid for the ground there. Whether there is a vault or not under the present parish church of Hackney, I do not know.

Now that continued to be the table of fees up to 1801; and looking through it, I do not find it any where stated, that any fee whatever is to be paid to the churchwardens for the use of the ground.

By the Local Act, burials in the church are prohibited, and also within twenty feet of the walls of the church; the rights of the minister are to a certain extent curtailed by this; and therefore the parish had in 1801, as they stated, been in the habit of allowing to the minister an annual compensation for the usual dues he would receive—what that annual compensation was, and out of what it arose, the Court is not informed. It may

be, that those fees which were usually paid to the churchwardens for the use of the ground, had been paid to the ministers since 1790—it may be so, I know nothing of that. Whether the churchwardens could, or might have received these fees, and ought to receive the fees in aid of the church-rates, I know not. I find, burying in a vault, the minister is to have 1*l.*, the churchwardens are to have 13*s.* 4*d.*—for what? for the great bell, *not for the ground*. For the fifth bell, 6*s.* 8*d.*; for the fourth bell, 4*s.*; and so it goes on, decreasing with the size of the bell: there is nothing, absolutely nothing, stated here as to any sum to be received by the churchwardens for the use of the ground.

Unquestionably, it is not for this Court to inquire as to the legality of the scale. It stands as a fee allowed by this table, the legality of which may be very questionable indeed—*that* the Court is not called on to determine.

There is nothing to shew that the churchwardens have ever since 1790, received fees for the use of the ground—nothing of the kind is alluded to in this allegation; it is said that those sums have been from time to time collected, without stating *when*, without stating at what time they last were so; and therefore, whether they thought themselves entitled to claim those dues and duties—the same dues and duties which were made payable under the provisions of the act which prohibited burials in the church, does not appear.

What they did receive, was for the use of the ground in the church, and for the parish vault; but it does not appear there is any such existing in the present churchyard.

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Under these circumstances I am of opinion that the churchwardens are not before the Court on any excessive rate. It does not appear they had a fund out of which these necessary repairs of the church could be paid. It is stated in the argument that this is very much the same as if there had been a rate not collected, and the Court will not hold a church-rate to be valid when the churchwardens, by collecting a rate already made and granted, can put themselves in possession of funds to defray the necessary repairs of the church. It appears to me to differ very materially from a case where the churchwardens by their own exertions—by calling on the persons who are assessed to pay the rate, can get possession of funds ; in which case they shall not be permitted, by the neglect of their duty, to call on the parishioners to pay an additional rate—to call on those parishioners who gave no trouble in the collection, who are willing to pay, and willing to discharge that obligation, which the common law imposes on them, without resistance. But this is not so. They must ascertain before hand what these fees are—that the fees are all receivable—whether they have been so appropriated by the order of the parish—whether they could recover them unless by involving the parish in a lawsuit ; if the parish are of opinion that these fees are improperly received by other persons, they must direct the churchwardens to take, or they must take means of recovering these fees from those persons who have unduly received them by an action at law, or otherwise as they may be advised ; or they may direct the churchwardens to do so and furnish them with funds to carry on the action ; because in these days we know that retrospective church-rates

cannot be enforced—if the churchwardens do embark in litigation they must take care to provide themselves with funds in some way or other, or to secure to themselves the repayment of the expense to which they may be put in prosecuting these suits—in this very suit, to recover the sum of 3*s.* 4*d.*! how are the churchwardens to be reimbursed for the expense they have been put to, unless by the parish in some way or other?

Under these circumstances therefore, I am of opinion that this is distinguished from the case of an *unlevied rate*. I am not prepared, even in the case of an uncollected rate—where the churchwardens can say they have done all they can to recover the rate, although there still remains a large sum uncollected which the parties are unable to pay in consequence of their poverty—to say, that they would not be entitled to another rate to enable them to carry on their duties in providing for the due sustentation of the fabric of the church, and providing the necessary articles for the performance of divine service. I cannot say, even if such a case could be shown, *that* it would be a sufficient reason why the rate should not be enforced.

Now this disposes of those objections which arise on the construction of the local acts, and of the general Act of Parliament.

There then remain two other points to be considered, namely, whether the rate has been imposed and properly assessed on the proper persons. That is, whether on the 10th, 11th and 12th articles of this allegation, this rate has been properly levied.

The 10th article merely pleads the act—the local act of the 50th of George the Third, by which the

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trustees of the poor of Saint John, Hackney, are authorized to compound—to take smaller sums for those rates than they would otherwise obtain. It is not necessary further to consider that. The 11th article I confess appeared to me to be somewhat an extraordinary article to be urged against the validity of the rate. “That although the names of the tenants of the said compounded houses are inserted in the church-rate book belonging to the said parish of Hackney, and a certain assessment affixed to each of them; yet it is not such tenants, but their landlords, who are applied to for payment of the said rate.”

I am not at all aware that this is any objection to the validity of the rate—that the proper persons being assessed, other persons were applied to for the rate—if they pay the rate which is properly assessed on the tenants and occupiers, I cannot conceive that is an objection to the rate; or even if the landlord had been assessed to the rate—if the landlord paid the rate—if the rate was paid for *that* house which is occupied by this person, although the landlord might be assessed, and might choose to pay that rate, I do not know that would be any objection to the *rate*, if the whole property in the parish had been properly assessed. All that is necessary is, to see what is the property of the parish, and that it is all rated?—whether the tenant is rated or the landlord, is nothing to the validity of the rate so far as other individuals are concerned. The particular tenant might say, “I am not to be rated, the landlord is to be rated;” *but* still if the premises were rated, although it should be assessed to the landlord, I do not know that would be an objection

to the rate, provided the rate was recovered : the money is forthcoming for the premises rated.

It is not necessary to decide that point or to consider it any further, because here in point of fact the proper persons are assessed, namely, the tenants, by their names and surnames, the proper persons have been assessed—if the landlords choose to pay the rate for them, that is no ground for objecting to the validity of the rate.

It then goes on to plead, “ that although the said assessment in the church-rate book is in itself below the real actual and proper value of such houses, and below their estimated rental in the poor-rate book belonging to the said parish, yet that in fact the landlords of the said houses or most or many of them do not pay the said church-rates according to such assessment, but according to the reduced compounded assessment contained in the said poor-rate book, under the aforesaid Act of Parliament.”

Now nothing can be more loose and indefinite than this mode of pleading, “ that the landlords of the said houses or *most* or *many*” without specifying in any manner whatever—“ are rated not according to their assessment, but according to the reduced compound sum.”

If it arose from a larger sum than otherwise necessary, it should be pointed out and specified which of the houses are so ; the question here is merely whether the rate is equal or unequal ?

They may be all rated according to the church-rate book, for any thing that appears in the article. If they are rated so, although it may be below the poor-rate, it is not necessary the rate should be un-

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equal ; it may not be necessary to follow the poor-rate in every instance. The mode of rating matters not ; if one is 100*l.*, or another 20*l.*, provided they are all rated in proportion to their value ; this is the point to be considered. Still less does it matter when the latter part of the allegation comes to be considered. “ That sixteen houses belonging to John Burton, a parishioner of the said parish, of the actual yearly rental of 120*l.* or 140*l.*, or thereabouts, and estimated in the poor-rate book at the value of 104*l.*, are charged in the rate of 2*d.* in the pound, at the sum of 16*s.* 8*d.*” What of that ? Suppose they are, other houses are charged in the same proportion, that is not the objection here ; the objection is this which follows : “ That although such sum is entered in the church-rate book, as having been paid in respect of the said houses, yet that the said John Burton did not actually, and in truth, pay more than the sum of 7*s.* 2*d.*, being the amount due from him for the said houses, upon the compounded poor-rate assessment, made under the provisions of the afore-said Act of Parliament.”

Why, if the churchwardens have been foolish enough, or liberal enough to accept the sum of 7*s.* instead of 16*s.*, they must suffer the consequence themselves : it is no loss to the parish. They have charged themselves with having received the whole sum, and they are accountable to the parish for the whole sum. If they choose to receive less than is their due—if they choose to charge themselves with the whole amount and only receive a part, that is their affair : that will not make the rate invalid : they are liable to the parish : if they have charged

themselves with more than they have received, the parish is no loser. There is no ground for objecting to the validity of the rate on that account.

Now the next article is the last which the Court has to consider, and that is on the real question of *inequality* of the rate; for it pleads "that seven houses situate in Water-lane in the said parish, are estimated in the poor-rate book of the said parish at the rental of 44*l.*, but that the same are assessed to the said church-rate at the annual rental of 28*l.* only."

Then it goes on to enumerate a vast number of other houses which are rated at a different sum in the church-rate book to that of the poor-rate book. If the rate is *unequal* and *unequally* assessed, I agree with the learned Judge in the Court below, that would be a ground for quashing the rate altogether: it is essential to a church-rate that each individual shall be rated equally in proportion to the property he possesses. But it does not give rise to the question of inequality by stating they are valued at a certain sum in the poor-rate book, and another in the church-rate book; because all the houses may be valued at the same rate in the church-rate book—they may be all rated at an under value. If some of them were rated at the value of them in the poor-book and others not, it would not follow that was the actual value. The poor-rate book may have rated some too high as well as others too low. The church-rate book may more equally have assessed them, and therefore on this article of the allegation it does not appear to me the question of inequality is properly raised, so

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that the Court can come to a conclusion upon it. I is too much to say the church-rate book and the poor-rate book must agree.

If the question of inequality is to be raised and insisted on, it must be done in a different and distinct form, and shew that some houses are rated much below their value; and that for which Mr. Nunn is rated, above its value.

Now under these circumstances, therefore, I am clearly of opinion that the Judge of the Court below has come to a right conclusion with respect to this allegation; and I perfectly agree with him in opinion that if the facts here stated were proved, *modo et formâ*, as they are alleged, they would not form a valid defence to the demand which was made on Mr. Nunn for the sum of 3s. 4d. under this assessment which has been made on him by the churchwardens of the parish of Hackney and consequently I am of opinion I must hold now against the appeal, and affirm the sentence of the Court below; and I must also, as a matter of course, do it *with costs*. What were the churchwardens to do? If Mr. Nunn will take on himself to litigate this demand which was made against him; and if, in the opinion of the Court below and of this Court, he is not borne out in the objection which he has made, I think it must be at his own expense that he does this, and not at the expense of the parish or at the expense of the churchwardens; and that I should stop short of justice if I did not affirm this sentence with costs.

PREROGATIVE COURT OF CANTERBURY.

MEDDOWCROFT *v.* HUGUENIN.1842.
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THIS was a business of bringing into, and leaving in the registry of this Court letters of administration of the goods, chattels and credits of William Meddowcroft, deceased, and shewing cause why the same should not be revoked as having been surreptitiously and under false suggestions obtained, and why letters of administration of the said goods should not be granted according to law; it was proposed by William Meddowcroft, theretofore passing by the name of Gregory, the natural, lawful, and only child of the deceased, against Harriet Huguenin, wife of Louis Huguenin, theretofore calling herself Meddowcroft, and pretending to be the lawful relict of the deceased.

A sentence of a Court of exclusive jurisdiction can only be impeached in another Court by reason of fraud and collusion practised in obtaining it.

Quere, whether the issue of a marriage, pronounced to be null and void by the sentence of an Episcopal Consistorial Court, can impeach such sentence in the Prerogative Court.

Allegation, seeking to impeach such a sentence rejected, on a review of the facts alleged by which fraud and collusion were proposed to be shewn.

The party cited having duly appeared, an allegation was given in on behalf of William Meddowcroft, pleading, that William Meddowcroft, the party deceased, on the 28th of February, 1815, duly intermarried with Mary Gregory, widow, in the parish church of St. James's Clerkenwell, and that an entry of such marriage was duly made in the register-book of marriages kept in and for the said parish; that the parties lived and cohabited together, and were reputed to be husband and wife. That there was issue of the said marriage, one child, the party proceeding in this cause, who was born in

1842. the year 1817, and, in the month of February in the same year, was baptised by the name of William and an entry thereof made in the register-book of baptisms kept for that purpose in the parish of St George the Martyr, in the county of Middlesex but that in the said entry Mary Meddowcroft, the wife of William Meddowcroft, deceased, and the mother of the party proceeding has been erroneously or fraudulently described as Mary Gregory.

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The defendant, Harriet Huguenin, gave in a defensive allegation, in which it was pleaded, That soon after the marriage in fact had between William Meddowcroft, deceased, and Mary Gregory, widow, to wit, in or about the year 1816, a suit of nullity of marriage (a) by reason of minority, and the undue publication of banns, entitled *Meddowcroft v. Gregory*, falsely calling herself Meddowcroft, was instituted in the Consistorial Court of London, by William Meddowcroft, the elder, the father of William Meddowcroft, the party deceased, against the said Mary Gregory, falsely calling herself Meddowcroft; and on Friday the 12th of July, 1816, the Judge of that Court did, by his definitive sentence or final decree in writing, pronounce, that the pretended marriage, however, in fact had been solemnized, was null and void to all intents and purposes in law whatsoever, pursuant and agreeable to the statute passed in the 26th year of the reign of his late Majesty King George 2. That no appeal was had or made against the said sentence or decree, and the same is now a valid and subsisting sentence or decree.

(a) See the Report of the case of *Meddowcroft v. Meddowcroft*, 2 Cons. Rep. 207.

The sentence was annexed in supply of proof.
This allegation was admitted without opposition.

A responsive allegation was given in on the part of William Meddowcroft, which pleaded,

First article, That he, the party in the cause, was born on the 15th of January, 1817, subsequent to the time when the said proceedings were so had, and the sentence given in the said Consistorial Court of London, and that, by reason thereof, it was *res inter alios acta*, and that such sentence cannot in law be holden to be binding and conclusive on the party in the cause, who was necessarily a stranger to, and had no means or power of intervening in the suit, by the result of which he both was and is most grievously damnified both in estate and reputation.

Second, That by reason of the fraudulent suppression of evidence in the said proceedings, and the erroneous evidence on which the said sentence was mainly founded, as hereinafter pleaded, such sentence is not a valid sentence, nor binding against the interest and rights of the party in this cause. That previously to the publication of the banns of marriage between the said William Meddowcroft, the deceased, and Mary his wife, then Mary Gregory, widow, in the parish church of St. James's, Clerkenwell, a paper of instructions for such publication, containing the true names of the parties, was delivered to Elizabeth Penry, the daughter of Joseph Penry, the parish clerk of the said parish; and the said Elizabeth Penry, who was in the habit of receiving notices for publication of banns of marriage, at the house of the said parish clerk, entered such names in a private banns book: That in so doing, the said Elizabeth Penry wrote the

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initial and second letters “*Me*” of the name Meddowcroft so as to resemble “*Wi*,” and such were so mistaken by the said parish clerk, who, not only in entering the said name in the said banns-book, mistook such letters, but also omitted the second letter “*d*,” and spelt the name *Widowcroft*: that in consequence thereof the banns of marriage of the said parties were published in the said church as between William Widowcroft, bachelor, and Mary Gregory, widow. That on the day of the said marriage, the mistake in the said banns-book, which until such time were wholly unknown to the said William Meddowcroft and the said Mary Meddowcroft, then Gregory, were first discovered; that on such occasion, the said mistakes appearing to have originated, as in fact they did, solely with the said Elizabeth Penry, and the said parish clerk, the same were corrected, under the directions of the Rev. J. Leese, the officiating minister of the said parish, in the said banns-book, and thereupon the said marriage was then duly had and solemnized in pursuance of the publication of such banns.

Third. That at the time of the proceedings in the said Consistorial Court, Elizabeth Penry was not examined as a witness, although living at the time, *she not having died until the month of August, 1823 (a)*. Nor was such paper of instructions, nor the said private book produced, nor any reason pleaded or assigned for the non-production of the same. That by such suppression and withholding of evidence the true character of the case was concealed from the Court.

(a) This and the passages subsequently printed in italics are the amendments made in the allegation.

Fourth. (a) That after the determination of the said cause, Elizabeth Penry repeatedly declared to several persons, that she was much surprised that she had not been examined as a witness therein, and that she had no doubt that the names of the parties were properly and correctly written upon the paper delivered to her as notice for the publication of banns, and that the surname of Meddowcroft was, through her mode of writing the same in the private book, mistaken for Widowcroft. And that up to the period of her decease, she invariably declared that the aforesaid mistake and its consequences preyed heavily upon her mind, and caused her great uneasiness.

Fifth. That as well before as during the progress of the proceedings in the Consistorial Court, the said Mary Meddowcroft, by false representations of the said William Meddowcroft her husband, and others, in respect to the advantage that would result to her from not contesting the suit, and more particularly from the solemn promise of her said husband, that, in the event of a sentence of nullity being pronounced, he would again marry her, and the said Mary Meddowcroft being entitled to a pension of sixty-five pounds per annum as widow to John Gregory, her husband, was induced *to carry on the suit collusively*, and neither to administer interrogatories to the witnesses produced on behalf of the promoter of the suit, nor to file any allegation on her own behalf, *and she the said Mary Meddowcroft, as well during the said proceedings, as shortly after the termination of the same so declared or to such effect to divers persons.* That in

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(a) This article was rejected.

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consequence of such withholding of evidence, the non-administering of interrogatories, and the omission to plead, *and the collusive conduct aforesaid*, there was no *bond fide* contestation of suit, and by reason thereof the true state of the facts was perverted or suppressed, and a surprise effected by the said William Meddowcroft, the promoter of the suit upon the justice of the Court.

Sixth. Pleaded, that James Meddowcroft, the great-uncle of William Meddowcroft, the party in the cause, by his will devised and bequeathed his real and personal estate to be accumulated for twenty-one years, and after that period to go to the eldest male lineal descendant of his nephew William Meddowcroft, the father of the party in this cause, and that such accumulations amount to 80,000*l.*, the time of accumulation having lately expired.

Seventh. That the party in the cause was not apprised of the circumstances under which the marriage took place, until the end of the year 1840, when the said Mary Meddowcroft, his mother, for the first time shewed him certain papers and documents connected with the proceedings, had as aforesaid, in the Consistorial Court, and made sundry communications relative thereto, which induced him to institute the present proceedings.

Eighth. That diligent search and inquiry has been made for the paper of instructions for the publication of the banns of marriage, and for the private book of banns; but the same cannot now be discovered. That such paper of instructions and private book were respectively in existence at the time of the proceedings in the Consistorial Court of London.

The admission of this allegation was opposed by *Addams and Robinson*.

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This is an attempt to impeach indirectly a sentence, *in rem*, of a Court of exclusive jurisdiction. Fraud in obtaining a sentence *in rem* can only be examined into by the Court in which the sentence was pronounced. *Meadows v. Duchess of Kingston*. (a) Admitting that a stranger to the record, who cannot be admitted to question the sentence directly in the Court where it was pronounced, may impeach it collaterally in another Court. *Prudham v. Phillips* (b), still the party proceeding in this cause is not a stranger to the record, but a privy, and he may question the sentence in the Consistorial Court. *Kenn's case* (c), and *Corbett's case* (d), decided this very point.

This is a sentence *in rem*, *Duchess of Kingston's case* (e), *Mayo v. Brown* (f), *Mellicent v. Mellicent* (g), *Blackham's case*. (h)

Phillimore and *R. Phillimore* in support of the allegation.

The Court is not asked to reverse the sentence of the Consistorial Court, but to pronounce such a sentence in this suit, in so far as respects the marriage between Mr. and Mrs. Meddowcroft, as Lord Stowell would have pronounced in the Consistorial had the facts now presented to the Court been before him on that occasion.

A sentence of a Spiritual Court is not conclusive on the subject of marriage, "*Sententia in causa*

(a) Ambl. 756-762.

(b) Ambl. 753.

(c) 7 Coke, 42.

(d) Ib. cited.

(e) 20 St. Tr. 431.

(f) Ib. cit.

(g) Ib. cit.

(h) 1 Salk. 290.

1842. *matrimoniali nunquam transit in rem judicatam.*" (a)
 Dec. 13th. A sentence in the Spiritual Court is not conclusive
 MEDDOWCROFT in a question of ejectment. (b)
 against HUGUENIN. It is admitted that a party may question a sen-
 tence, affecting his interest, if pronounced in a sui-
 to which he was not a party; the party in this caus-
 was no party to the suit in the Consistorial Court.
 he could not be, for he was not born until after the
 date of that sentence. The issue are strangers
 the record. *Brownsword v. Edwards.* (c)

Addams, in reply.

Brownsword v. Edwards, merely affirms an un-
 doubted proposition, that, after the death of one of
 the parties to a marriage, no sentence of nullity
 can be given touching that marriage. If the issue
 cannot question the sentence in the Spiritual Court
 no person can do so; clearly the parties to the suit
 are precluded from doing so, what then becomes of
 all the learning in *Kenn's case*?

JUDGMENT.

SIR HERBERT JENNER FUST.

The present allegation is not offered in such a
 shape as will enable the Court to dispose of the
 question at once.

It must be quite manifest that if suits of nullity
 are to be ripped up in the manner now proposed,
 that the Court may be called upon to inquire into
 the validity of many other marriages which have
 been dissolved in the Spiritual Courts; the pro-
 ceedings in this case should, therefore, be of the
 most formal and regular nature. Now it is pro-

(a) Gail. Obs. p. 112. (b) 2 Smith's L. C. 192. (c) 2 Ves. 243.

posed to establish the fact of the erroneous entry in the private banns-book having been made by mistake, by the declarations of Elizabeth Penry. I am decidedly of opinion that her declarations cannot be received in evidence for such purpose. The fourth article, therefore, must be rejected.

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Again, with respect to the fifth article ; that article is proposed to be proved by the evidence of Mrs. Mary Meddowcroft, one of the parties in the former suit ; and who would in effect be setting up her own marriage, and deposing to her own benefit : that also must be rejected.

The allegation must be reformed by omitting the fourth and fifth articles, and by pleading in the regular form the proceedings had in the Consistorial Court.

This allegation was afterwards reformed by supplying the passages (in italics) in the third and fifth articles, and by pleading two additional articles, the first of which was as follows :

That during the proceedings in the said Consistorial Court, and for some days subsequent to their termination, William Meddowcroft, the party deceased, and the said Mary Meddowcroft continued to cohabit together as husband and wife, when the latter suspecting, as she at that time declared, that the said William Meddowcroft did not intend to perform his promise of again marrying her, had recourse to professional advice as to the expediency of an appeal from the sentence of the said Consistorial Court ; but, being informed that no fresh facts or other evidence could be introduced, and otherwise dissuaded therefrom, she returned to cohabitation with the said William Meddowcroft, in

1843. the hope, as she repeatedly declared, of being able
 February 13th. to induce him still to fulfil his promise of again mar-
 MEDDOWCROFT rying her, and that she continued to cohabit with
 against him until the birth of their child, the party in this
 HUQUENIN. cause.

Second. Exhibited the several proceedings in the Consistorial Court of London in the cause of *Meddowcroft v. Meddowcroft*.

Before this allegation was given in as reformed, the Court called the attention of the counsel in this cause to a case of *Mellicent v. Fisher*, coram Delegates, 1718. Prerogative, 1716—and supplied the parties with the following note :—

“*Mellicent v. Fisher*, Michaelmas, 1716, Delegates, 1718—Mellicent made will, and his wife Dorothy, and three others, executors, who pray probate. Caveat entered by Alice—warned. Proctor appeared for Alice and her son—next Court proctor appeared for son only, and prayed answer to his interest. The proctor for the executors “*ad evitandum ingressum litis*” alleged, that the deceased in a cause of *jactitation*, 1680, had obtained a sentence against Alice, and that afterwards, 1687, her suit for restitution of conjugal rights was dismissed; and sentence was exhibited. The son alleges this sentence was null, being done in his absence and infancy, and that an appeal had been interposed by the guardian of him in 1687. Exhibits appeal, and prays an answer to his interest. Adverse proctor insists he is not by law obliged to answer to his interest, but consents he may be admitted as contradictor to the will. The Judge of the Prerogative ordered him to answer to his interest—affirmed by Delegates.”

In this case it was insisted that the son's interest

was dependent on the mother's; if she had obtained sentence for marriage that might be pleaded by him and could not be controverted; the law looks upon him as the same person, the interest being the same and derivative. [In this case Alice the mother was examined as a witness, but her deposition was suppressed. She has an interest in the cause if his interest be pronounced for, and he should set aside the will, she may come in for a share of distribution.] The civilians of opinion that the marriage was sufficiently proved. Price and Eyre, Judges, thought otherwise. The intent in permitting him to plead was in order to shew collusion in obtaining the first sentence—none appears, it must be presumed to be good, and will bind him.

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No common law Judge being with the civilians, for the marriage, there was no sentence.

The allegation, as reformed, came on to be debated.

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In *Mellicent v. Fisher*, the sentence was not *in rem*, it was a jactitation suit. The depositions and proceedings in the Consistory Court, which are now annexed to this allegation, shew that every fact which is pleaded to have been suppressed, and from which the fraud and collusion are to be inferred, was before Lord Stowell. Mr. Penry, the parish clerk, in his deposition refers to the entry in the private banns-book; he says, "that on referring to the private book he finds an entry in the handwriting of his daughter:"—clearly then the private banns-book was produced in the Consistorial Court.

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Phillimore and R. Phillimore.

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This party labours under the imputation of bastardy, by reason of a sentence pronounced previous to his birth; the Court will labour to assist him in removing this stigma; *Mellicent v. Fisher* is a complete authority in support of the present allegation.

Per Curiam.—According to your argument every child, and every child's child may bring a suit to have the sentence reversed; they will equally be strangers; I do not see where it is to stop.

Counsel. That may be the effect, it is the consequence of the fraud and collusion by which the sentence was procured.

JUDGMENT.

SIR HERBERT JENNER FUST.

I shall reject this allegation. I think the facts stated, if proved, would not be sufficient to induce the Court to revoke the administration already granted to Mrs. Huguenin, the second wife and widow of Mr. Meddowcroft, deceased, he having, subsequently to the sentence of nullity of marriage pronounced in the Consistory Court, married again. Mr. Meddowcroft died several years ago, and administration to his estate and effects was taken by his widow, who is now by a second marriage become Mrs. Huguenin. These letters of administration, so taken out, had remained unquestioned until very lately, when they were called in at the instance of William Meddowcroft, formerly called Gregory, the party proceeding in this cause; and he seeks to have them revoked, on the ground of having been obtained on false pretences.

The first step in this cause was the usual form of

a citation; that was returned; an appearance was given for Mrs. Huguenin; an allegation was brought in by the party proceeding; it pleaded the marriage of William Meddowcroft, deceased, with Mary Gregory, the mother of the party proceeding, in the year 1815, and the birth of the party in the year following; and the death of his father in 1835.

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That allegation was of course admissible, as pleading the interest of the party; shewing a marriage in fact between his father and mother previous to his own birth, and, as a matter of consequence, his own legitimacy, and interest in distribution to the estate of his father.

This allegation was met by an allegation in answer, pleading a sentence of the Consistorial Court of London, in the year 1816, pronouncing the above marriage to have been null and void, and exhibiting an official copy of the actual sentence. This allegation was admitted without opposition.

This plea has been followed by a third allegation; which forms the subject of the present discussion. The general tenor of it is to shew, that this sentence was *res inter alios acta*, by reason that the party proceeding in this cause, who is undertaking to shew the legality of that marriage, was not living when that sentence was pronounced, and therefore cannot be bound by it; and further alleging, that such sentence cannot be held binding on him, inasmuch as it was obtained by fraud and collusion; and it pleads matter in proof of that collusion. Now without considering whether the party proceeding can plead the nullity of the sentence in this Court, I will consider the other points of the case, in order to try whether (admitting the party has a right so to plead)

1843. he has shewn circumstances sufficient to establish
 February 13th. case of collusion. Perhaps the better way will be
 MEDDOWCROFT to see what is the collusion charged ; I pass over the
 against first article and come to the second, which pleads
 HUGUENIN. “ That by reason of the fraudulent suppression of
 evidence in the proceedings, and the erroneous ev-
 dence on which the sentence was mainly founded
 as hereinafter pleaded”—therefore this is not a gen-
 eral averment, but professing to shew particular
 matter in a subsequent part of the plea.—“ Such
 sentence is not a valid sentence, nor binding
 against the interest and rights of the party pro-
 ceeding ; for he doth allege, that previously to the
 banns of marriage between William Meddowcroft
 deceased, and Mary his wife, a paper of instruction
 was delivered.” [The Court read the second article—
 page 405.] Now the article concludes,—“ in pur-
 suance of the publication of such banns”—how true
 could be, the banns having been published in the
 manner previously stated, was the question which
 Lord Stowell had to decide.

The third article pleads, that Elizabeth Penry
 was not examined in the Consistory Court, although
 living at the time,—then, as reformed, it pleads her
 death ;—therefore, she cannot be produced to prove
 that the inaccurate publication of the banns was
 owing to her mistake. The same article pleads
 that the paper of instructions delivered to Elizabeth
 Penry is lost and not forthcoming ;—therefore the
 Court cannot have the benefit of that evidence. On
 what evidence then is it to be shewn, that it was her
 mistake, that the names in which the banns (which
 it was admitted were erroneously published) were
 so published ? The fact that at the time of the mar-

riage a mistake was discovered and corrected by the clergyman in the banns-book will not shew this; Mr. Penry, the clerk, was alive in 1815, and was examined in the Consistory Court, his deposition shews that he was then sixty years of age, and it is scarcely to be supposed that he is now alive, or, if so, competent to give evidence.^(a) How then can all these facts be established by evidence?—Independent of that which will form the subject of the present consideration, the declaration of Mrs. Gregory, the mother of the party. The second and third articles only allude to the proof of the above facts, by pleading, that the private banns-book was not before the Consistory Court;—but that is not the case, most certainly it was produced on the examination of J. Penry; this clearly appears from the portion of his evidence which has been read: it was before the Court. The third article, therefore, is incorrect in stating that the private banns-book was not before the Court; this book is not now in existence, and cannot be produced, the Court cannot get any information as to how the mistake in copying the name arose.

The 4th article, as the allegation originally stood, was intended in supply of proof of the third. This article the Court rejected; it contained matter which could not be made evidence, and the paper of instructions, referred to in it, was alleged to be not forthcoming.

The 5th article pleads, [The Court read it, *ante*, p. 407.] Now the 2nd additional article, which exhibits, in supply of proof, the proceedings in the Consistory Court, shows, that the suit was promoted,

(a) It was here admitted by the counsel that he was dead.

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1843. and carried on by the father and guardian of William Meddowcroft, deceased, who was a minor at the time: it was, therefore, the suit of the guardian, not of William Meddowcroft, the husband: there might be collusion between the husband and wife, but there would be no collusion between the father carrying on a suit in his own right, as guardian of his son and the wife. The 5th article pleads, "That Mary Gregory was induced neither to administer interrogatories to the witnesses produced on behalf of the promoter of the suit, nor to file any allegation on her own behalf, and she, as well during the proceedings as shortly after the termination of the same, so declared to divers persons. That in consequence of such withholding of evidence, the non-administration of interrogatories, and other collusive conduct as aforesaid, there was no *bona fide* contestation of suit, and, by reason thereof, the true state of the facts was perverted or suppressed, and a surprise effected by William Meddowcroft, deceased, the promoter of the suit, upon the justice of the Court." Why! William Meddowcroft, deceased, was not *the promoter of the suit*, he was the husband of Mary Gregory; his father was the promoter of the suit. Nothing that can arise on this part of the case can go to prove the fact of the mistake in the publication of the banns: can the conduct of Mary Gregory, even if acting in collusion with her husband, in any way affect the sentence obtained by the father who was no party to the collusion?—but how is all this proposed to be proved? The Court, on a former occasion, was of opinion, without the assistance it has since had from the case of *Mellicent v. Fisher*, that Mary

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Gregory could not be examined as a witness; because in establishing her son's legitimacy she would be establishing the validity of her own marriage; if her evidence is to be credited, she, and not Mrs. Huguenin, is the widow of the deceased; administration to the deceased has already been granted to Mrs. Huguenin as the widow, and in this suit the Court is to consider, whether that administration is to be revoked, as having been obtained on undue representations. I cannot discover any principle on which a party can be let in to establish the truth of her own marriage, and so to disprove the validity of another marriage, and to bastardize the issue of that second marriage. The Court having, on the former occasion, been of this opinion, and directed the article to be struck out, the parties have now sought to substitute her declaration, instead of her own evidence; so that I am to give credit to her declarations, when I cannot give credit to her direct evidence:—how can this possibly be done?

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Phillimore. It was a declaration, made *recenti facto*.

SIR HERBERT JENNER FUST.

That does not carry it one step further: I am clearly of opinion that Mary Gregory's declarations cannot be received on any such ground; how can I hold any such declarations to be proof that the sentence was collusively obtained? Suppose that she was advised or induced not to administer any interrogatories, and not to file any allegation, and "that she so declared both during and shortly after the

1843. proceedings in the Consistory Court,"—how is that
 February 13th. to affect the sentence of the promoter of the suit,
 MEDDOWCROFT who was no party to the advice, or to the induce-
 against ment? I am clearly of opinion I must reject this
 HUGUENIN. article; the point was expressly determined in *Mel-
 licent v. Fisher*. It has been argued that that was
 a cause in which the widow was suing in *propria
 causa*, she appeared by her proctor; the real ground
 of the rejection was, that she was attempting to
 establish her own interest.

Then the first additional article pleads,—“That during the pendency of the proceedings in the Consistorial Court, and for some days subsequently to the termination thereof,”—that is, after the determination of the suit, and not during it, so that Lord Stowell could not have had the fact before him,—“William Meddowcroft, deceased,”—who, as I have said, was no party to the suit, it was the father’s suit,—“and Mary Gregory continued to live and cohabit together as husband wife, when Mary Gregory suspecting, as she at that time declared, that William Meddowcroft, deceased, did not intend to perform his promise, of again marrying her, had recourse to professional advice; the result of which is stated to be, that she was induced not to appeal from that sentence.” I do not know who gave her this advice, I may have done so myself, for I was one of her counsel; but, however, whether I did so or not, I will take it she was so advised, as also, that “she was otherwise dissuaded from appealing.” [The Court then read the conclusion of this article, *ante*, p. 411.] This is the article which is to prove collusion between the parties to the suit in the Consistorial Court: I am of opinion that, if proved to the fullest

extent, it could form no evidence whatever in this cause.

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The 6th article pleads merely the death of Mr. James Meddowcroft, the great-uncle of the party in the cause, and how he has left his property by his will, namely, to accumulate for a certain number of years, and then to devolve to the eldest male lineal descendant then living, of his nephew, William Meddowcroft, deceased, the father of the party in this cause. [The 7th article pleads, *ante*, p. 408.] [The Court read it.]—How are the communications here spoken of to be proved; how can the mother be examined to these points? The 8th article pleads, “That diligent search and inquiry has been made for the paper of instructions for the publication of the banns of marriage, and for the private book of banns, but that the same cannot now be discovered; but the party doth expressly propound that such paper of instructions, and private book, were respectively in existence at the time of the proceedings before the Consistorial Court.” I am of opinion that not only were they in existence, but the private banns-book was actually before the Court. The 2nd of the new additional articles exhibits, in supply of proof, the whole of the proceedings in the Consistorial Court in the usual form.

These are the whole of the circumstances pleaded to show collusion between the parties to the cause in the Consistory Court. I have already stated that the greater portion of this consists of matter which is not evidence; what the Court wants to know is this,—what was the point to which E.

1843. Penry, the daughter of the parish clerk, ought to
 February 13th. have been examined, what could she have estab-
 MEDDOWCROFT lished? That, in the paper of instructions, '*Wid,*'
 against was written by her for '*Medd,*' the fullest extent of
 HUGGWIN. her evidence would not have gone further than
 this; it would not have proved that the banns were
 published in the name of Meddowcroft, and not of
 Widdowcroft: indeed the banns are admitted to
 have been published otherwise.

It has been argued that I am not called upon to reverse a sentence of Lord Stowell, but to pronounce such a sentence in this cause, as Lord Stowell would have pronounced in the case before him, if he had been apprized of all the facts. What is the evidence now before me, admitting the case now set up to the fullest extent, which was not before Lord Stowell? Suppose Mr. Penry had stated in his deposition, that his daughter received the paper of instructions, in manner now pleaded, and that by her mistake the names were mis-spelt in the banns-book, would that have altered Lord Stowell's opinion? Would the fact that no interrogatories were administered, and no defensive allegation asserted, have had this effect?—Lord Stowell was quite aware of all these facts.

What is there, then, on which the Court is to pronounce that this sentence was obtained by collusion? so far as I can discover, the only ground alleged is, the non-production of Elizabeth Penry as a witness; the absence of the paper of instructions, which is pleaded to be lost; and of the private banns-book, which is either lost, or not forthcoming. It might, by possibility,—I do not say that it would have been—have been a different case

if Elizabeth Penry was now living, and capable of giving evidence ; but there is positively no evidence on which the Court could proceed to say that this sentence was obtained by collusion.

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Suppose the cause of *Mellicent v. Fisher* to be an authority, to shew that this Court will entertain a suit, in the teeth of a sentence in the Consistory Court, where collusion in obtaining that sentence is proved ; still it appears by that case, that the party had been actually admitted a contradictor of the will ; the Court below was of opinion, as were the delegates, that if once a party is admitted a contradictor he cannot afterwards be called on to prove his interest : what the judges said there was this, that the admitting him to be a contradictor was binding on the other party ; that he should not have been admitted to contradict the will, unless his interest had been proved : the fullest extent of that case would only go to shew, that when once his interest as contradictor had been admitted the other party could not estop him from proving a valid marriage between his father and mother.

I am, therefore, clearly of opinion, that what is stated in this allegation is not sufficient to shew collusion ; and this I think shews the propriety of the Court, in the first instance, calling on the party proceeding to exhibit the proceedings in the Consistory Court. I think that if every fact now before the Court had been before Lord Stowell, it would not have altered his decision one iota. I am of opinion that I could not question this sentence on any ground, unless it be on the ground that it was obtained by fraud and imposition in the Consistory Court ; if under any other circumstances I was to

1843. hold that such a sentence was questionable, un-
 February 13th. doubtedly I could not bind any other party by my
 MEDDOWCROFT sentence, and if not, then why may not the children,
 against grandchildren, and issue *ad infinitum* question the
 HUGVENIN. sentence at any future time: where is the matter
 to stop?

I feel bound to reject this allegation on all these grounds.

[The Proctor for the party proceeding asserted an appeal in Court.]

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BURGESS v. MARRIOTT.

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It is no part of the jurisdiction of this Court to enter into questions of construction, but the Court may, incidentally, be compelled to do so; (e. g.) in deciding, whether to compel an executor to exhibit an inventory at the suit of a party claiming to be entitled in distribution to a residue undisposed of by a will.

Inventory not ordered, the executor admitting assets.

JOHN OWEN died in July 1815, having made a will and codicil, whereof he appointed three executors, all of whom proved in the same year. In November, 1842, a citation issued, from this Court, at the instance of William Burgess, therein described as the son and administrator of Sarah Burgess, widow, deceased, who was, whilst living, one of the sisters of John Owen, deceased, and one of the parties who, at the time of his decease, was entitled in distribution to the residue of his estate and effects undisposed of by his will: it called on Thomas Marriott, the surviving executor of John Owen, to exhibit an inventory and account; to see portions allotted, and distribution made of the estate of his testator, pursuant to the Act of Parliament.

Thomas Marriott appeared under protest, which, as extended, stated, That the testator, by his will gave to Elizabeth Phipps (one of his executors)

2000*l.* for life, and at her death one moiety thereof to her daughter, and "the remaining 1000*l.* to be disposed of as I shall hereafter mention."

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That the will contained no further mention of the 1000*l.*; that there was no residuary bequest in the will or in the codicil; and, save as to the life interest in the 2000*l.* of Elizabeth Phipps, no legacies given to the executors. That the executors, being nude executors, were entitled to the undisposed of residue. That the case involved a question of construction which this Court had no jurisdiction to adjudicate upon.

In answer to the protest, it was alleged, that by the will professing an intention to make a further disposition of the 1000*l.*, the claim of the executors was excluded, and consequently, that the 1000*l.* became divisible among the next of kin of the deceased living at the time of his death.

Addams, in support of the protest, cited *Roper on Legacies*, 2 vol. p. 640.

Robinson, contra, in opposition to the claim of the executors, cited *Davers v. Dewes* (a). He argued further, that, both by the Statute and the Canon Law, an executor is bound to exhibit an inventory without waiting to be called on to do so; that, in *Phillips v. Bignell* (b), Sir *J. Nicholl* had laid it down, that a mere contingent interest was sufficient to entitle a party to call for an inventory. That a party was entitled to know whether any of the estate of the testator remained undistributed, before he incurred the expense of litigating the question of construction in the Court of Chancery.

(a) 3 P. Wms. 40.

(b) 1 Phill. 239.

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I think I am bound to overrule the protest, inasmuch as it seeks to avoid giving an inventory; the party is clearly entitled to an inventory, or to an admission of assets.

The question arises with respect to the property of a gentleman who died so long ago as July, 1815, and whose will was proved in the same year, very shortly after his death: and now, in the year 1842, his surviving executor is called upon, to exhibit an inventory and render an account; to see portions allotted, and distribution made according to the Act of Parliament. The executor has appeared under protest, denying the right of the party citing him, to call for the inventory; and denying that this Court has jurisdiction in this case, as being one involving a question of construction. This Court must sometimes of necessity enter into points of construction, before it can decide, whether a party, who calls for an inventory, is entitled to require one. The statute (21 H. 8, c. 5, s. 4,) enacts, that an inventory shall be exhibited in every case without being called for; but this is not done, according to the practice of this Court, at the present time; the Court now always exercised a discretion, whether or not to compel an inventory, and in cases where there has been a great lapse of time between the death of the party and the citation, calling for the inventory, has frequently refused to enforce the exhibition of an inventory (a). In this case the Court must necessarily enter into the question of construction

(a) See *Scurrah v. Scurrah*, 2 Curt. 919.

tion, for if it were to hold that the party is not entitled to call for an inventory, it would in effect be deciding that he is not entitled to any part of the property of the deceased; I am bound to see that a party, calling for an inventory has an interest to the extent of the citation. As to this part of the case, I think I am bound to require an absolute appearance by the executor; I should, however, be willing to accept an admission of assets in lieu of an inventory, or any admission which would enable the Court to exercise a discretion, and not to call for an inventory: I shall certainly pronounce that the party has not shewn a sufficient interest for calling on the executor to see portions allotted and distribution made. Both parties have lost their way in the case; the executor in protesting against appearing and exhibiting an inventory; the other party in requiring more than an inventory. The course I must take will be, to overrule the protest, and to assign Mr. Marriott to appear absolutely, but, if he will admit assets to the extent of 1000*l.*, I will not enforce the inventory.

[The party being present in Court, without revoking his proxy to his proctor, admitted assets to the amount of 1000*l.* The Judge directed the Registrar to make a minute of such admission.]

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In the Goods of MARGARET NEWTON, deceased.

February 22nd.

One of two joint administrators having become imbecile and incapable of acting, ordered, that the joint letters of administration (brought into the Registry) be revoked, and special letters of administration granted to the sane administrator.

MARGARET NEWTON died in the year 1825, leaving her father surviving. Mr. Newton, the father, did not administer to the effects of Margaret Newton; he died in the year 1827, having by will appointed two executors, who both proved. In the year 1827, joint letters of administration to the effects of Margaret Newton were granted to the two executors of Mr. Newton, and her estate was duly administered. Margaret Newton was absolutely entitled to a vested interest in one-third of a sum of 786*l.* consols, expectant on the decease of a lady who died in the present year. Upon the determination of the life interest in the sum of 786*l.*, it became necessary to give a release for the one-third accruing to Margaret Newton's estate, and also to pay the duty thereon. Both the administrators were alive, but one of them was paralytic, and incapable of transacting any legal or other business. On affidavits of the above facts, made by the sane administrator, by the niece, and by the medical attendant of the other administrator, the Court was moved, that, on the joint letters of administration being brought into the registry they might be revoked, and special administration granted to the sane administrator.

H. I. Nicholl, in support of the motion, cited the case of *Phillips*, deceased, November, 1824 (2 *Add.* 335) in which, in the analogous case of three administrators, one of whom had been found a lunatic, the

Court had, at first, directed, upon the letters of administration being brought in by the two (sane) administrators, and by the committee of the third, that letters of administration *de bonis non* should issue to the two (sane) administrators. Upon reference, however, to the registrar's book, it appeared, that in March, 1825, the Judge was pleased to order the letters of administration *de bonis non* to be revoked, and that a special administration be granted to the two administrators.

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NEWTON,
deceased.

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I think, upon the authority of that case, which appears to be precisely in point, the party is entitled to the order as prayed. I should, however, say, that, but for that case, there might have been some doubt as to the precise form in which the order should go.

In answer to a question by the registrar, the Court stated, that the sureties need not justify.

CHAPPELL v. CHAPPELL.

1843.

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JOHN CHAPPELL died intestate, leaving a widow, a brother, and two nephews and two nieces, minors, him surviving: letters of administration to the goods, chattels, and credits of the deceased were prayed on behalf of the widow, and also of the brother of the deceased.

Administration granted to the brother of an intestate in preference to the widow.

Addams and *Bayford* for the brother.

Harding for the widow.

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against
CHAPPELL.

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The deceased in this case died in the month of May, 1842, leaving a widow, a brother, two nephews and two nieces, the children of a deceased sister, him surviving, being the parties entitled in distribution to his estate and effects, and in the following proportions; the widow to a moiety, the brother to one-half of the other moiety, and the nephews and nieces, between them, to the remaining one-half moiety of the whole property. Administration to the estate of the deceased has been demanded by the widow, this claim is opposed by the brother, and a grant of administration prayed for him.

Now the claim of the widow was at first opposed by reason of some objection arising out of a deed of separation between her and her late husband, under which he agreed to allow her 60*l.* per annum, and in respect of which she claims a sum of 300*l.* to be due to her for arrears. This objection has, and I think very properly, been abandoned, and the widow is now to be considered as legally entitled to a moiety of the whole of the property. It has, however, been proved that after her separation from her husband, she contracted a second marriage—an invalid marriage certainly—during his lifetime with a Mr. C., and continued to cohabit with that person up to the death of her husband,—that is, the intestate in this cause. The affidavits of the sexton of the church, and of other persons present at the time, prove the fact of this second marriage; indeed, on the part of the widow it is not attempted to be denied.

Now the question is, who is entitled to the grant of administration? According to the practice of this Court, the rule is to grant it to the widow; undoubtedly, however, it is in the discretion of the Court to grant it to the brother.

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The widow alleges, that the separation between her and the deceased was not owing to her fault, that it was caused by her husband persisting in cohabiting with another female. I think there is sufficient, in the affidavits, to shew that the husband did not impute any misconduct to her in regard to the cause which led to their separation; I think I must take it to be so, and consider the separation, whatever was the cause of it, as not having arisen from any fault of the widow.

Now, as against the character of the brother, there is not the slightest imputation whatever.

The case then resolves itself into a question for the exercise of the discretion of the Court in the grant of letters of administration as between two parties, one a person of unblemished conduct; the other a person against whom there are circumstances of blame; for certainly by her conduct in this second marriage, after the separation between her husband and herself, she did misconduct herself. The brother is entitled to one-fourth of the whole property, the widow to one-half; the nephews and nieces to the remaining one-fourth: these last parties are minors of tender years, and many years must elapse before their shares can be paid over to them. The whole property is under 800*l.*, and the widow claims 300*l.* in the nature of a debt owing to her from the estate.

Looking to all the circumstances, and not laying

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more stress on any one fact than another, I think I ought to exercise my discretion in favour of the brother; I think I ought to do so in order to protect the interests of the children, and ought not to leave the widow in possession of their shares of the money for so long a time as must intervene between the grant and the payment to the minors—it is chiefly in reference to this circumstance that the Court so decides; for I do not mean to say that otherwise there is sufficient reason for refusing to intrust the widow with the management of this property.

I decree administration to the brother in the exercise of that discretion which the Court is entitled to exercise.

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MAJOR and MUNDY v. WILLIAMS and ILES.

A testatrix duly executed a will, and, subsequently thereto, two other wills, in both of which was contained a clause revoking all former wills. She afterwards destroyed the two latter wills. *Held*, that the first will was not thereby revived; and, that parol evidence is not admissible to shew an intention to revive.

CHARLOTTE BARFIELD, deceased, made, and duly executed a will on the 15th of January, 1841; whereof she appointed the plaintiffs executors. On the 2nd of February, 1841, and, on the 3rd of May, 1841, she made, and duly executed two other wills, in both of which was contained a clause revoking all former wills. Upon the death of the testatrix, the will of January was produced by the plaintiff Mundy, in whose custody it had been placed; but, neither of the two subsequent wills could be found. The will of January was propounded by the executors in a common *condidit*. A defensive allegation

on the part of the next of kin of the testatrix, pleaded, the due execution of the two latter wills; that each of such wills, contained a clause revoking all former wills; and, that the will of January had never been revived in manner required by the 22nd section of the Wills Act. The personal answers of the executors admitted the facts to be as stated on behalf of the next kin; but the executors, in a responsive allegation, pleaded, "That the testatrix had, previously to her decease, repeatedly stated to a female attendant, that she had destroyed the two latter wills; that her will was in the hands of Mr. Mundy, who, with Mr. Major, were her executors.

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The cause came on for hearing.

Addams in support of the first will.

The 20th section of the Wills Act, enacts, That no will shall be revoked save by another will, or by some writing, duly executed, declaring an intention to revoke the same; and the 22nd section provides, that a will, once revoked, shall not be revived, otherwise, than by a due re-execution thereof. It must be admitted, that the strict letter of the statute is against the validity of the will now propounded; but the expressions of the act are general, and may be controlled by the clear intention of the framers: the Court has already held that a literal construction of this act may be dispensed with, *Hobbs v. Knight* (a), *Brooke v. Kent* (b). The leading object of the act was to exclude oral testimony in all cases. The 20th section evidently

(a) 1 Curt. 768.

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(b) Privy Council, unreported.

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means, that the will or other writing, which is to revoke a prior will, shall be in existence at the death of the testator; in the second alternative mode of revocation, the *intention* to revoke a prior will must be shewn; clearly, then, that intention requires to be evidenced, not by parol evidence (the contents of the revoking instrument, but by the language of a produced writing. *Swinburne*, and all the text writers, state, that a will, once valid but revoked by a subsequent will, revived on the destruction or cancellation of the revoking instrument; such cancellation might be shewn by parol evidence; the present act intended, that there should be neither revocation nor revival, save by some writing, by which the intention to revive or to revoke could be safely arrived at. Look to the consequences of admitting parol evidence in this case; a door is at once opened to fraud and perjury; and that too, with but little risk of detection a disappointed heir-at-law, or next of kin has only to procure two persons to swear, that an instrument in writing, revoking a valid and forthcoming will was executed in their presence: the most solemn will is liable to be destroyed.

Jenner and *White*, contra, stopped by the Court

JUDGMENT.

SIR HERBERT JENNER FUST.

I feel that I have no discretion to exercise in this case. There have undoubtedly been cases decided over and over again under the Statute of Frauds, holding, that parol evidence was admissible to prove the revival of a once revoked

instrument. It was this that led to the introduction of the 20th and 22nd sections into the present Wills Act. It is admitted, in this case, that the testatrix did, subsequently to the execution of the will of January, make two other wills; that both of these were duly executed; and both contained a clause expressly revoking all former wills; then the first will was revoked to all intents and purposes, and to have a re-operation, it must have been revived. Then was it revived? The only mode by which it could be revived is that pointed out by the 22nd section. That section is most express; there must be a *re-execution*, there are no other means of shewing an intention to revive; destruction of the revoking instrument is not sufficient, it is not a re-execution of the revoked will, according to the present act. I pronounce against this paper as a will.

I think, however, that this question has been very properly brought under the consideration of the Court, and I give costs out of the estate..

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CRAIGIE and GRAIGIE *against* LEWIN and Others.

1842.

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JOHN CRAIGIE, a lieutenant-colonel in the East India Company's military service, died suddenly at

by birth, but holding a commission in the military service of the East India Company, was cited in the Prerogative Court to prove the will, or show cause why administration should not be granted of the effects of the deceased as dead intestate; *Protest* to appearing to such citation, by reason that confirmation had been granted of such will by a Court in Scotland, a competent forum, *overruled*. The domicile of origin does not revive until an acquired domicile is finally abandoned.

A native Scotchman having, by employment in the military service of the East India Company, acquired a domicile in India, *held*, that by his return to Scotland *animo manendi* his original domicile did not revive, the party still holding his commission and being liable to be called upon to return to India; and intending to return if called upon to do so.

The executor named in a holograph will, of a Scotchman

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Hatchett's hotel, Piccadilly, on the 23d of November, 1840, having made a paper-writing of a testamentary nature, all in his own handwriting, dated the 14th of October, 1840, but not attested by witnesses; of this paper he appointed Richard Lewin, John Larkins, and William Bell, executors. The deceased left a widow, and four children, minors, him surviving.

On the 2nd of August, 1841, a decree, with intimation, issued from this Court, at the instance of E. Mackintosh, the curator or guardian of the eldest son of the deceased, alleging, that it was pretended, that the deceased was at the time of his death a domiciled Scotchman, and that, by reason thereof, his will, although not witnessed, was valid in law, and citing the parties, named as executors, to prove the same, or to show cause why administration of the effects of the deceased, as dying intestate, should not be granted according to law.

The widow intervened in the cause. The parties cited, having been duly served, appeared under protest.

In support of the protest, it was stated, that the will of the deceased, who, by birth at least, was a Scotchman, being a holograph will, is valid and effectual as a Scotch will, although unattested. That the deceased had his legal domicil in Scotland at the time of his death; although actually deceased in London. That the parties cited, named as executors, had duly proved such will in the proper Court of Scotland, according to the form prescribed by act of Parliament for the proof of wills and registration of probative wills in Scotland; that they had obtained the usual probate or confirmation

of will, had acted as executors, thereby becoming amenable to the Courts of Scotland, and otherwise incurring heavy responsibilities, wherefrom they cannot be released by the sentence of this Court, or by any means, other than a reduction of the probate granted by the Scotch Courts ; and submitting, that under the circumstances this Court is not the proper forum in which the domicile of the deceased ought to be tried, but that the said question ought to be raised, and tried in the Scotch Court, being a Court of equally competent jurisdiction, and from the sentence of which an appeal may be prosecuted to the House of Lords in England.

In answer to the protest, it was stated, that the deceased was born in Glasgow, of Scotch parents, and, at an early age, went to India as a cadet in the military service of the Company, and continued in such service up to the time of his death. That in 1822, the deceased came to England, on public duty, and in January, 1823, was married in England, and returned to India, in 1824. That in 1837, the deceased, then become a lieutenant-colonel in the Company's service, left India, and proceeded to England, on a three years' furlough, and arrived in England, in August, 1837. That, in October, 1839, he obtained an extension of leave of absence for six months, and in June, 1840, a further extension for six additional months, by which, his leave of absence from India would not expire before March 1841.

That after arriving in England, in 1837, the deceased and his family resided in London, until the 16th of October, when he proceeded to Scotland ; that he resided, in Edinburgh, in ready-furnished houses, until the 9th of August, 1839 ; when

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he returned to London, with his family, and resided in London for four months, and about ten months previous to his decease went to reside at Plymouth, in the county of Devon, at which place his family continued to reside up to the time of the death of the deceased.

The matter of protest came on for argument.

Addams and *Robertson*, in support of the protest.

The *Queen's Advocate* and *Jenner*, contra.

JUDGMENT,

SIR HERBERT JENNER FUST.

I am clearly of opinion that I am bound to overrule this protest, and to require the executors to contest the validity of their asserted will in this Court. It is admitted that the deceased was a Scotchman by birth, that is not disputed; and I take the fact, of his having, at an early age, gone to India, in the service of the East India Company, not to be disputed. What effect this latter circumstance had on the domicil of the deceased is a question hereafter to be determined; the question must eventually come back to this,—what was the domicil of the deceased at the time of his death, for on the law of the country of domicil must depend the validity of the will. I am rather at a loss to understand how it happened; that whilst this question was undecided, and it must be obvious to all parties that sooner or later it would be agitated, the executors took probate of this paper in the Court at Scotland. The parties whose interest is affected by this being upheld as a valid will, call on the

executors to propound the paper in solemn form in this Court, surely they have a right to do so; I cannot see how the fact of the Court of Scotland having granted probate of the paper can conclude the Court on the question of domicil. I do not understand that the question of domicil was raised in the Scotch Court; the application to that Court was to grant probate in common form. Neither do I understand the principle on which the jurisdiction of this Court is objected to; and if the Court feels that it has jurisdiction, assuredly it cannot stay its hand. Suppose a mandamus to issue, from the Court of Queen's Bench, to this Court requiring it, to proceed in this matter, and this Court were to make a return,—that the matter had been decided by the grant of probate in common form in the Court of Scotland. Would the Court of Queen's Bench accept of such a return?

I do not consider that I am ousting the Scotch Courts of any jurisdiction to decide on the question of domicil: I do not consider that they are in possession of the question, or that it is even intended to raise the question in the Scotch Courts; neither do I think that I ought to yield up the decision of such question to those Courts.

It is obviously for the benefit of all parties that the domicil of Colonel Craigie should be determined; I therefore overrule the protest, assign the parties to appear absolutely, and reserve the question of costs.

The executors having appeared, an act on petition was entered into; the facts therein set forth were similar to those already stated in the protest: they are fully stated in the judgment.

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The matter of the petition then came on to be heard.

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Addams and *Robertson*, for the executors. admit, that up to the year 1837, the deceased must be considered a domiciled Anglo-Indian, by reason of his commission in the military employment of the East India Company, *Munroe v. Douglas* and *Bruce v. Bruce*(b), but on his return from India the deceased proceeded to Scotland with a full intention of reviving the domicile of origin; domicile of origin is easily revived, *Somerville v. Somerville*(c), *The Virginie*(d). This is a case of testacy which is subject to different considerations from intestacy, *Curling v. Thornton*(e).

The Queen's Advocate and *Jenner*, contra. The deceased contemplated the possibility of a return to India; if so the legal requisites to complete a change of domicile are incomplete; we might concede the *factum* of residence in Scotland, but rely on the contemplated return to India; if *animus manendi* be wanting, the fact of residence cannot work a change, or a revival of domicile; in this case, the fact of residence in Scotland cannot be insisted on, for the deceased was quite as much domiciled in England as in Scotland. The distinction between testacy and intestacy is exploded, *Starr v. Bernes*(f), *De Bonneval v. De Bonneval*(g).

JUDGMENT.

SIR HERBERT JENNER FUST.

The facts of this case lie in a narrow compass,

(a) 5 Madd. 404.

(d) 5 Rob. 99.

(f) 3 Hagg. 33.

(b) 2 Bos. & P. 229 n.

(e) 2 Add. 7.

(g) 1 Curt. 81.

(c) 5 Ves. 750.

the law applicable to them is not difficult to determine.

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The question relates to the domicile which is to determine on the validity of a paper purporting to be the will of Colonel J. Cragie, who died on the 23rd of November, 1840, at Hatchett's Hotel, Piccadilly. The will is dated in the month of October preceding, it is in the shape and form of a Scotch deed, a holograph, subscribed by the deceased, but not attested by any witnesses; and consequently, as it was made since 1840, if the deceased is to be considered as a domiciled British subject, the will is invalid for want of a due attestation; if on the other hand, he is to be considered as a domiciled Scotchman, then the law of Scotland must determine on the validity or invalidity of this paper as a will.

The question in the present case is not, whether the domicile of this person was Indian or English, for the law of England and India are now the same, as regards the validity of wills; whether it was so at the time when the act of the 1 Vict. c. 26, passed, does not matter in this case, because an act was shortly after, January, 1838, passed by the legislature in India, assimilating the law of India in respect to wills to that of England; there is no necessity, therefore, to consider, whether the domicile was English or Indian, provided it was not Scotch. This leads the Court to inquire into the history of this gentleman. He was born in the year 1786, in Scotland, his parents were Scotch, and they also were of Scotch descent, he remained in Scotland, indeed was never out of that country, until 1804, when he went to India in the East India Company's military service, in which he had ob-

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tained a commission as a lieutenant of a regiment of native infantry. By birth, descent, and genealogy, therefore, his domicil was clearly and decidedly Scotch, and he did not abandon that domicil until he became of age; when he acquired an Indian, or as one counsel has called it, an Anglo-Indian domicil. Having entered into the service of the East India Company, and having attained his age of twenty-one whilst in that service, his domicil became Indian, or Anglo-Indian; for it is the same thing. In India he remained until 1837, with two exceptions; he was in England in 1819 until 1820, and he was also at the Cape of Good Hope from February 1824 until October in the same year; on the first of these occasions, when absent from India, he did not visit Scotland; it is said in explanation, that he came to England on a special mission from the Marquis of Hastings, the duties of which fully occupied his time. On the second occasion, when at the Cape of Good Hope, his domicil was clearly Indian. During the visit of the deceased to England in 1822, he married an English lady,—I do not think this fact of any importance, it merely amounts to this,—that being a domiciled Indian, he married whilst being on a visit to England, he carried his wife back with him to India, he had children by her, and he lived in India from that time until the year 1837, when he came over to England on the customary leave of absence, but still retaining his commission in the East India Company's service: he came on a three years' leave of absence, though, it is stated, that such leave is renewable for two years more; so that he had every prospect of remaining in this country for five years;

he applied for renewal of leave of absence on two occasions, and obtained it; this would have carried his leave of absence down to March, 1841,—he died in November, 1840. Now it is said this leave of absence being granted as a matter of course, the deceased had every expectation that before its expiration he should have succeeded to a commission of full colonel in the service, which would have precluded the necessity of his returning to India, to which it is admitted he had a decided aversion. If he did not return to India on the expiration of his leave of absence, or previously attain his full rank, he must have quitted the service of the East India Company [33rd Geo. 3, c. 55]. Now it appears, that the deceased had no intention of abandoning his commission, unless he became a full colonel, he must, therefore, at this time, 1837, have contemplated the possibility, if not the probability, of being obliged to return to India, if only for a short period. It appears, that on his arrival in this country, in 1837, after remaining in England a short time, the deceased proceeded direct to Scotland, and arrived there in the October of that year, and he continued in Scotland until August, 1839, living, whilst there, in furnished houses; it further appears, that during the time of his residence, he contemplated the purchase of a house in Edinburgh; he wished to take a lease of a house for seven years, and offered to take such a lease of a particular house; but it had been purchased by another party to whom he offered 100*l.* to give up the bargain, and not being able to succeed in effecting his wishes, in August, 1839, he quitted Scotland, and by the advice of his medical attendant, came to London; from thence he went

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 hood, in furnished houses; until the death of
 father, in 1840, when he left Plymouth, and ag-
 went to Scotland to attend his father's funeral;
 he remained in Scotland until October in that year,
 when he returned to London, and died at Hatchet
 Hotel in November, 1840, being at the time
 about to join his wife and children at Plymouth.
 This is the statement on behalf of those who desire
 to support the Scotch domicile; on the other side
 there is very little difference in the statement of the
 facts, the affidavits scarcely vary the case at all;
 they all coincide in the fact, that the deceased did
 express an intention of taking up his abode in
 Scotland, in his wish to take a particular house in
 Edinburgh, that he offered 100*l.* to the purchaser of
 the lease to give up the bargain; that as late as
 1840, he again expressed a wish for the same
 house, or of purchasing some other house in the
 neighbourhood of Edinburgh; and that he was
 desirous of sending his son to study with some
 civil engineer in that neighbourhood. The
 circumstances are undoubted—from them I think
 the Court can come to the conclusion that if every-
 thing had turned out according to the deceased's
 own wishes, he would have taken up his residence
 in Scotland; no one can look to his letters with-
 out seeing, that he had a decided preference for his
 country of his birth; unfortunately his wife had a
 different opinion, she preferred residing in England,
 and she at last persuaded the deceased, that such
 residence would be better for themselves and
 children. It appears to me, that having resided in
 Scotland in 1839, he did not go back until 18

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and then only to attend his father's funeral, and when that ceremony was over, he returned to England. 1843.
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These are the facts of the case, so far as is important to the present question ; but the Court will have to refer more particularly to the exhibits, before coming to a conclusion on the case. Now I do think, that if all circumstances had combined to favour the deceased's wishes, he would have taken up his residence in Scotland ; but still the question remains, whether there was an abandonment of the Indian domicil, and if there was the *animus* and *factum* of a domicil in Scotland. It was properly asked by the counsel for Mr. Craigie,—when was it that the Indian domicil was abandoned, and the Scotch acquired ? The answer, or the tenor of the answer to the question, was, at the time when the deceased went to Scotland in 1837, that he then went there for the purpose of remaining, in short, that he did it *animo manendi*, with the intention to preclude all question as to his domicil ; that he took up his residence there *animo et facto*. The question then remains for the Court to determine ;—it being an admitted fact that the deceased went to Scotland in 1837, and remained there until 1839,—whether he went there *animo manendi* ; the solution of that question depends very much on his peculiar situation at the time ; whether he was in a condition to abandon his acquired domicil in India, for if he was not in a condition to abandon his Indian domicil, the intention, even, if to a certain extent complete by the fact of his having come to this country, *animo manendi*, if he could possibly remain, would not be sufficient to change the

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domicil ; if the deceased was not in a condition to carry his intention into effect, that is, if his remaining in this country was dependant on circumstance which might be such as to render it incumbent on him to return to India, that is, if certain events did not give him an opportunity of finally quitting the service. In 1837, when the deceased arrived in this country, he retained his commission in the East India Company's service, he not only came on leave of absence for a distinct period ;—it signifies not whether there was a greater or less probability or whether as a mere matter of course, his time of absence would be extended for two years more, he was still absent on leave ; he retained his commission in the Indian army, his regiment was in India, and his military establishment there ; he had quitted India only for a temporary purpose, not with a fixed determination to abandon it altogether, but with the intention to return, unless on the happening of a particular event, namely, his attaining the rank of full colonel before his leave of absence expired.

The question is, whether a person having a fixed domicil, and having quitted it with the proper intention of returning, although such intention may be annulled by the happening of a particular event, can by law be said to have abandoned that domicil ; this is the important part of the case ; did the deceased, when in 1837, or in 1839, he went to Scotland, go there *animo manendi*, or did he merely go there to remain, so long as the rules of the service in India would permit, and no longer ? Now the correspondence and the affidavits tend to show that he contemplated returning to India ; he mig

have continued to live in Scotland during the whole of the time of his leave of absence, but would that have been a residence *animo et facto*?—the *animus* would only be whilst his absence from India permitted, for if he did return to India, his Indian domicil would revert—perhaps I should not say *revert*, because it would never have been divested. When the deceased came to this country, he quitted India on a temporary absence, which might be converted into a permanent quitting, by a certain event happening, in the interval between the time of the commencement of his absence and the time for his return; I cannot think that the fact, that he was absent from India, when he was looking to a probable return, can be said to be quitting that country *animo manendi* in another; he was indeed in another place, but for a temporary purpose only. Now, up to 1839, when he last quitted Scotland, his domicil was India, I cannot conceive, that by having left India under the circumstances mentioned, he had divested himself of the domicil acquired by his commission in the East India Company's service; in 1839, he went to Plymouth with his wife and family, he resided there, although only in furnished lodgings. If the question was between a Scotch or an English domicil I should decide for the Scotch domicil, notwithstanding his returning to England, and living there in furnished lodgings, and although, as has been argued, he had at one time expressed a wish to purchase a house near Plymouth; and although his actual residence was so far in this country; except for a short time when he went to Scotland on his father's death; and although he died in the act of returning thence

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1848. to join his wife and family in this country.
 February 28th. important question is, what is necessary to constitute a change of domicile? There must be *animus et factum*; that is the result of all the cases. This case must depend on its own circumstances, and the principles on which it is to be determined are the same in all cases, and that principle extra from all the cases, is this, "That a domicile acquired remains until another is acquired, or first abandoned; I admit all that has been said in this case, that length of time is not important, a day will be sufficient, provided the *animus* exist if a person goes from one country to another, the intention of remaining, that is sufficient, whatever time he may have lived there is not enough unless there be an intention of remaining.

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It is now my duty to consider the effect of the exhibits, and of the particular circumstances set out in the affidavits, for the purpose of shewing grounds, on which the Court thinks, that the deceased had not abandoned his Indian domicile, retained his establishment in India, his connection with his regiment, of which he remained lieutenant colonel, still continued, he was bound by the requirements of the service to rejoin his regiment at the expiration of his leave of absence (a).

Now admitting the fact of actual residence in Scotland from 1837 until 1839, and the wish for a fixed and permanent residence in Scotland; admitting that the deceased had a decided preference

(a) The Court then examined the letters of the deceased, exhibited in the suit, and commented on the language. The result which the Court arrived at was, that the deceased evidently contemplated permanent residence in Scotland.

for Scotland, and that, if peculiar circumstances did not interfere to prevent him carrying that inclination into effect, he would have settled in a house in that country; still he had not at the time of his death placed himself in such a situation as to enable the Court to say, that he had abandoned his Indian domicil; and acquired a permanent domicil in Scotland; the deceased had not abandoned his Indian domicil, he could not do so without resigning his commission, he did not intend to do so, unless he obtained the rank of full colonel. Although the bias of his inclination was to live in Scotland, and, even if he had remained there during all the time he was absent from India on leave, I should still have held, that by retaining his commission, which might, and probably would, have compelled him to return to India, the deceased had not abandoned his Indian domicil. If so, then can it be said that he had abandoned that domicil? his connection with that country, which originally gave him his Indian domicil, still remained in full force: it was indeed liable to be dissolved by his attaining his full rank.

Looking to all the circumstances of the case, I think it is distinguished from all those cases which counsel have most judiciously abstained from going into; they have all been considered here often and often. I think the Indian domicil was not abandoned, but that the deceased was still domiciled in India. If he had died in Scotland that would not in the slightest degree have changed my opinion; he was domiciled in India: if the question had been, whether he was domiciled in England or in Scotland, if that point had been *in equilibrio*, the

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1843. place of birth and origin might have turned the
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I think there is quite sufficient in this case, to enable the Court to determine, that the Indian domicile, which the deceased had acquired, did not remain at the time of his death; when I look for the *animus* and the *factum*, I do not find sufficient to enable me to say, that the deceased had dissolved his connection with India; and I think, under the circumstances, that the Scotch law cannot determine on the validity or invalidity of this will.

The question is, whether probate is to pass, following the prayer of the one proctor, or administration, according to the prayer of the other? The distinction, adverted to in the course of the argument, between cases of testacy and intestacy makes no difference. It has been held in the cases *Stanley v. Bernes*, *Curling v. Thornton* and *Bonneval v. De Bonneval*, that a person, in order to make a valid will, must conform to the law of the country where he is domiciled; just as when he makes no will, he must be supposed to have intended distribution according to the law of the country. It appears to me that this asserted will is null and void according to the law of India, which was the place of domicile of the party; and that administration must be granted according to the law of England. I cannot, however, at this moment pronounce against the will, it has not yet been propounded; it may be propounded as a valid English will. I assign the proctor to declare next Court day whether he propounds this paper or not.

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WILLIAM WISEMAN died on the 25th of September, 1842; shortly after his death a testamentary paper, dated the 21st of April, 1842, was propounded, as the last will and testament of the deceased, by Charles Gaze and George Gaze, the executors named therein; its admission to probate was resisted by John Gaze, and other persons entitled in distribution to the personal estate of the deceased in case he should have died intestate.

The allegation propounding the will, pleaded, that it was all in the handwriting of the deceased, and that on the 21st of April, 1842, he duly executed the same in the presence of three witnesses, who duly subscribed the same in his presence.

William Wood, the first witness, deposed, "That on the morning of the 21st of April, 1842, the deceased, accompanied by the two other subscribing witnesses, called on him, and asked him to accommodate him with the use of the table in his parlour; that witness having assented, the deceased placed on one of the flaps of the table a paper folded up; the deceased sat down at the table, and took from his pocket a pen and a bottle of ink; he unfolded the lower part of the paper on the table, keeping the upper part folded, so that witness could not see the writing on it; the deceased wrote '*a something*' on the paper, but what witness cannot say; he then lifted up the folded part of the paper to write what he so wrote, which he did on the left hand side of

A testator produced a will, all in his own handwriting, and having his name signed at the end thereof, to three persons, and requested them to put their names underneath his. Held, a sufficient acknowledgment of the signature, the Court being satisfied, (although there was no express evidence of the fact), that the signature was of the handwriting of the testator.

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the bottom of the paper, and which only consisted of a word or so; he then took a book, and placed over the part folded down, so as completely to cover it, and prevent the witnesses seeing what was written on the paper; the deceased then got up and sat in another chair, at the end of the table, and asked witness 'if he would sign his name underneath his own'—witness accordingly signed his name underneath the deceased's name, which he observed prefixed on the lower part of the paper, & there was no other part visible; that this was at a different part of the paper from where he had seen the deceased write on the paper; that the two other witnesses then signed their names underneath the deceased's name and his own, the deceased having asked them to sign their names; that what the deceased then wrote on the paper, he wrote in the presence of all the three witnesses, who signed their names in the presence of the deceased, and of each other; the deceased did not tell them it was his will at the time; witness did not see the deceased write any part of the writing, except the trifling word or two in the corner. That witness perfectly remembers the seal on the paper, and that the names of the deceased were written on either side of the seal at the time witness signed; that he feels satisfied they were not written on the will by him (the deceased) in his presence, for what he wrote was not near the seal, but in the left hand corner, where the date appears. That to the best of his recollection, the deceased, when he asked witness to sign his name, pointed to that part of the paper where it was folded, where his name was prefixed, and asked him to put his name underneath his (de

ceased's) name, one name on one side, and the other on the other side. That witness cannot depose precisely to the exact words he used, but his meaning was, that witness should sign one of his names on one side of the seal, and the other on the other.

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On cross-examination, the deceased did not sign his name in the presence of witness, or acknowledge his name or signature as having been written or signed to the will, in witness's presence; for he did not do so formally, any further than by asking witness to put his name underneath his (deceased's) name; the signature of the deceased was not placed to the will by any person, for him or by his direction, in the presence of witness; the deceased did insert the date in the will in witness's presence; the deceased, during the whole of the time, was in a great state of nervousness; dreadfully so; witness verily believes that the deceased could not at that time have signed his name in the firm character of handwriting in which it appears on the will; the deceased's hand trembled greatly during the transaction."

George Marshall deposed, "That, on the 21st of April, he received a message from the deceased, to go to Wood's (the first witness) house: that he went thither; that deceased, witness, and the two other witnesses went into Wood's parlour together; that the deceased, whilst alone with witness, told him he was going to sign his will, and wanted him (witness) to sign it; that the deceased produced the will, unrolled part of the paper only, and laid a book upon it, so that witness could not see the writing thereon; that the deceased asked Wood to sign his name to it; the deceased did not sign it

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himself first; he wrote '*a something*' on the paper but witness did not see what it was; Wood signed first, then witness signed underneath Wood's name the deceased asked him to do so, and pointed out the place where he was to sign; witness did not see the writing on the paper; he saw the deceased with a pen in his hand, write something on the paper but cannot say whether he signed it, or not; witness has no recollection whatever of the deceased having acknowledged his signature; the whole transaction only occupied a few minutes, and witness did not pay much attention to it. That he recollects the deceased asking Wood to write his name underneath his, and that, before he did that he had the pen and ink in his hand, and wrote something on the will."

On cross-examination. "That witness was too far off to see what the deceased wrote on the will but is certain his fellow-witnesses were close enough to see it; the signature of the deceased was not placed to the will, by any person for the deceased in witness's presence; that the deceased, after writing something on the will, said he had written it very badly; that the deceased was in a state of nervousness during the whole time; his hand trembled very much."

Thomas Thompson deposed, "That on the 21st of April, the deceased sent to tell him and Marshall to go to Wood's house, that they went there, joining the deceased, before they got to the house; they went into the parlour together; the deceased pulled out a paper, and laid it on the table, undoing the lower part of it only, laying a book on the other part; he then said he wished them to pu

their names at the bottom of the paper; the deceased had a pen and ink with him; he wrote on the left hand corner of the bottom of the paper the words, '21st of April,' he said, directly he had done so, 'I have done it bad;' he then told Wood to put his name underneath his (deceased's); where the seal was upon the will; after that witness and Marshall signed, the deceased putting his finger down, and pointing out the exact place where they were to sign. That witness cannot swear that the deceased used the words 'my name,' or 'seal,' he said, pointing to the proper place, 'Put your name underneath here,' or 'put your name down here,' or 'put your name underneath my name here.' The place he pointed out being under his own signature."

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On cross-examination. "The deceased did, not sign his name, or acknowledge his signature, in the presence of the witnesses, further than by telling them to put their names underneath his; witness saw the deceased's signature on the will, the part folded down did not cover that; he supposes the deceased could not have written his name in the firm character in which his name appears, for even when he wrote the date, his hand trembled all the while."

Addams, for the executors.

Jenner, for the next of kin.

This is a case of execution of a will, by acknowledging the signature; there is no evidence that the signature is in the handwriting of the deceased, or, made for him, that it was made in his presence,

1843. and by his direction. The 9th section of the Will
 March 14th. Act is imperative,—if a signature is made for a tes-
 GAZZ tator, by some other person, it must be made in hi
 against tator, by some other person, it must be made in hi
 GAZZ. presence and by his direction.

Per Curiam.—Suppose a testator procures a person to sign his name for him, at a time when no one else is present, and that person dies, then, according to such a construction of the Act, the will must be invalid, for there can be no evidence of the fact in such case. Surely, if a testator acknowledges a signature to be his, that is sufficient, unless the contrary be proved.

Jenner. The words of the 20th section are the same as those of the 9th; there is no attempt to account for the absence of evidence of the handwriting.

JUDGMENT.

SIR HERBERT JENNER FUST.

The only doubt I have felt during the discussion is, as to whether I ought not to rescind the conclusion of the cause, in order to furnish an opportunity for procuring further evidence as to the handwriting of the signature; for the circumstances of the case are so very strong to show, that the deceased meant this paper to operate as his will, that I think there can be no doubt, if the signature is in the handwriting of the deceased himself, that he did sufficiently acknowledge it.

The deceased died in the month of September last year; he made his will in the April previous. The purport of the evidence, as to the execution, is

this:—the deceased told two of the witnesses—there are three subscribed witnesses to this paper—that he was going to sign his will, and appointed a meeting for that purpose, at the house of the third witness; the parties being assembled, he produces this paper as his will, and he adds the date; the body of the will is of considerable length; and it purports to dispose of the whole of his property. The deceased himself produces this will to the witnesses, it being ready signed and sealed, he directs them to put their names to it as witnesses; it does not exactly appear, whether the words he used were “put your names below mine,” or pointed out the place where their names were to be signed: the witnesses do subscribe the will in the presence of the testator, and of each other. There can be no doubt of the intention of the deceased that this paper should operate and take effect as his will.

Then is there a sufficient acknowledgment of the signature of the deceased—assuming the signature to be of his own handwriting,—to this will? I think it would be a hypercriticism to say that there has not been a sufficient compliance with the words of the Act in this respect.

It has been argued, that there is no evidence that this signature is in the handwriting of the deceased; that it may have been made for him by some person, and, if this be so, that there should be some evidence that the signature was made in the presence of the deceased, and by his direction; but I see no reasonable doubt as to the signature being in the handwriting of the deceased; one witness does indeed say that the deceased’s hands were in such a state that he could not have written his

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name to the will; but it appears to me, on looking at the original will, that the whole body of the will is in the same handwriting as that of the signature, and it is admitted, in the answers of the party, that the body of the will is in the handwriting of the deceased.

I feel so convinced of this signature being in the handwriting of the deceased himself, that I am unwilling to rescind the conclusion of the cause, for the purpose of procuring direct evidence of the fact.

I pronounce for the will, but I think this is a case in which the costs should come out of the estate. I think that it was very proper to call the attention of the Court to this case.

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BIDDLES *against* BIDDLES.

A will was written on three sides of a sheet of paper; on the fourth side was written a codicil. Both instruments were signed in the presence of, and attested by the same two witnesses, and at the same time; the witnesses were not informed of the fact that they were attesting two separate instruments. The codicil to a great extent annulled the will. *Held*, that this circumstance was sufficient to discredit the will, it being proved to have been the voluntary act of a capable tatrix.

THIS was a business of proving, in solemn form of law, the last will, with a codicil of Mary Biddles spinster, deceased.

The will and codicil were written on one sheet of paper; the will, with the attestation clause, and the names of the subscribing witnesses, exactly occupying the three first sides of the sheet; and the codicil, dated the same day as the will, occupying the greater portion of the remaining or fourth side. The will of the deceased, after directing the payment of her debts, bequeathed to her nephews

The codicil to a great extent annulled the will. *Held*, that this circumstance was sufficient to discredit the will, it being proved to have been the voluntary act of a capable tatrix.

Thomas Biddles, 1000*l.*, to bring up and maintain her natural child, F. Biddles; and gave and bequeathed all the rest and residue of her estate and effects, equally between her four natural children; with directions for their maintenance and advancement, and with benefit of survivorship, in case of the death of any such child or children under twenty-one: and, in case none of such children should live to attain the age of twenty-one, the deceased gave and bequeathed her property to her nephew Thomas Biddles.

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Thomas Biddles, the nephew, and Thomas Biddles, a brother of the deceased, who, by a former will, was nominated as an executor of the deceased, were appointed the executors of this will.

By the codicil the deceased gave and bequeathed to her nephew, Thomas Biddles, 5000*l.*, to be paid to him as soon as possible after her decease.

The will and codicil were signed by the deceased, and attested by the same two witnesses at one and the same time.

The will and codicil were propounded, in a common *condidit*, by Thomas Biddles, the nephew, and were opposed by Thomas Biddles, the brother, in the capacity of the executor of a prior will: the opposition was principally confined to the codicil.

The personal estate of the deceased was estimated by Mr. Thomas Biddles,—the nephew, at 12,000*l.*, by Mr. Thomas Biddles, the brother, at 8000*l.* only. The two attesting witnesses were examined.

Mary Clewer, deposed,

"My husband and I witnessed Mrs. Biddles' will, in July, 1841; Mr. Biddles came to our house; I

1843. happened to leave the room for a short time, on
February 13th. return my husband said to me, 'Mrs. Bidd
BIDDLES wishes to know whether you have any objection
against sign her will with me?' I answered, 'certain
BIDDLES. not, if you think right:' there was at this time
paper, on a table, which stood in our room, ac
the bow-window; Mrs. Biddles was sitting, with
table before her, in one corner of the bow-windo
and Mr. Biddles, her nephew, who had come w
her, on this occasion, was sitting at the oth
corner; Mrs. Biddles drew the will before her, a
opened it; it must have been Mrs. Biddles, w
did that, for I do not recollect that Mr. Biddles
all interfered in respect to the will. I do
remember that he made any remark about the w
or even touched the paper, or noticed it in any w
My husband, Mr. Clewer, fetched a pen and in
and put them before Mrs. Biddles; she took up t
pen and dipped it in the ink, and she unrolled t
paper before her, and wrote her name 'Ma
Biddles.' Directly Mrs. Biddles had signed, s
turned the paper round towards us for Mr. Clew
and me to sign; we signed the paper in her pr
sence, and in the presence of each other, and
the same table. Mrs. Biddles signed the paper
two places; so did Mr. Clewer and I; Mrs. Bidd
first signed one side, and then the other, and s
then turned the paper round to us, and we signe
each of us twice. I did not read the paper, or hear
read; I do not remember any remark being ma
about our signing twice; I did not know that t
pages we signed contained distinct documents:
did not hear anything said about what we h
signed. Mrs. Biddles folded the paper up, and p
it in her pocket."

On cross-examination. "The script (B), the codicil—is now before me ; my attention is directed to the words, *five thousand pounds to be paid to*, written in the sixth and seventh lines ; the words are certainly strangely written, very different from the rest of the writing of the paper ; but I cannot distinguish the remains or traces of another word written over or near the words *five*, or *thousand*. I certainly can, on examining the words closely, see traces of paler ink underneath some of the letters referred to, but it does not appear to me, as if the words had been painted over, or altered in any way. I cannot discover any trace, or appearance, or remains of the words *six* and *hundred* written over or near the same, or otherwise substituted in their place. I was not the least aware of the purport or contents of the codicil in question at the time of the execution thereof. I really do not know what I should have done if I had been aware of the same, or whether I should have witnessed such a document or not. I do not know that I should have witnessed it in that case without satisfying myself that the deceased well knew the full purport thereof. I know that the deceased has evinced attachment for her children, but I had no opportunity of knowing what were her wishes and intentions with regard to them. My present feeling is, that if I had been aware of the contents of the codicil, and the large portion of her property left away from the children, I should have declined witnessing it. I do think, that knowing the affection she had always shewn to her children, I should have spoken to her about what she was doing."

Richard Clewer deposed, "I witnessed Mrs. Bid-

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dles' will; the subject was introduced by Mrs Biddles and Mr. Biddles, both of them at the same moment as it were, asking if Mrs. Clewer and would be witnesses to Mrs. Biddles signing her will. Mrs. Biddles, without saying more, took the will out of her pocket, she signed it in two places, the second and third pages of the paper; she did so on her own accord, and without any help or suggestion. I do not know but what it was her will that was contained on both pages that she signed, for I do not recollect that any observations were made about why she signed twice, but when I came to sign the paper myself, I saw enough of it to see that they were separate documents on the two pages; and I believe I saw enough to satisfy myself they were a will and codicil. Mrs. Clewer and I each signed the paper twice; we signed in two places. After we had done so, Mrs. Biddles took the will up, folded it, and put it in her pocket. I recollect her making some remark denoting that she was satisfied it was done, and that it was proper for every person to make a will. Mrs. Biddles did everything on her own free will and accord, without Mr. Biddle interfering in any manner that I recollect. It was evident from Mrs. Biddles' manner, that she came quite prepared to transact the business of signing her will."

On cross-examination. "The deceased was extremely fond of her children; she always, as far as I witnessed, expressed herself in such a way as to lead me to believe that her children were objects of strong affection to her. I have seen with the deceased a little boy of the age of four years; I cannot of my own knowledge say, that such child is the result of a cohabitation between her and the pre-

ducent. I never in direct terms heard her name the child as her own, but I have heard her speak of it to her little boy under my charge as his brother, and I have heard her speak of the producent as its papa. My attention is directed to the words *five thousand to be paid to*, written on the sixth and seventh lines of the codicil. I cannot say I can distinguish the remains or traces of any other words written over or near the words *five* or *thousand*. The words *five* appears to have been written over twice, ink upon ink, and the ink being of a distinct colour; the whole of the words referred to seem to have been painted over, or retouched. I cannot discover any appearance, or trace, or remains of the words *six* and *hundred* as having been originally written in the place or near the words *five* and *thousand*. I recollect observing the word *thousand* on the codicil; I recollect it catching my eye from being more prominent, and my impression then was, that it had been written in a different hand from the body of the document; but I did not examine it so as to be able to say whether it bore the appearance it does now. I was not in the least aware of the purport or contents of the codicil in question at the time of the execution thereof; if I had understood at the time, that the effect of the codicil had been to injure the deceased's children, to have taken from them property to the large amount it does, I should certainly have hesitated about signing it without first satisfying myself that the deceased well knew, and had well considered the purport thereof."

The cause came on to be heard on the *condidit*, and the evidence taken thereon, no allegation having been given in by the opposing party.

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against
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1843. *Addams and R. Phillimore* in support of the will 1
February 13th. and codicil.

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Haggard and Harding, contra.

The onus of proof cast upon the party propound- -
ing these papers is not satisfied by mere proof of
execution in a case so pregnant with suspicion as
the present. The will and codicil are written on
the same sheet of paper, they are executed and
attested on the same day, and the codicil almost
entirely nullifies the will. Suppose a party to
make a will of considerable length, disposing of
property upon complicated trusts, and to add a
clause at the conclusion, revoking his aforesaid will
in all particulars, would the Court be satisfied with
mere proof of execution of such a will? In this
case the only erasure that can be discerned on the
face of the codicil is in the place where the impor-
tant words *five thousand* are written; both wit-
nesses can discover that there has been some tam-
pering with the instrument, although they are
unable to trace it with any accuracy.

JUDGMENT.

SIR HERBERT JENNER FUST.

The question, in this case, respects the will and
codicil of Mary Biddles, which are both contained in
one single sheet of paper. This paper is propounded
by Mr. Thomas Biddles, a nephew of the deceased,
and one of the executors, named in the will,
and the admission to probate is opposed by Mr.
Thomas Biddles, a brother of the deceased, who is
also an executor, named in the will, and also an
executor, named in a former will of the deceased;

and as such he opposes the grant of probate of the last will and codicil.

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This will and codicil are propounded in a common *condidit*, and the personal answers of the opposing party have been taken; and I will here state, that the answers do not admit all that is averred in the *condidit*: on the contrary, Mr.

Biddles, the opposing party, swears,—“that he, the respondent, believes that the deceased was, at the time of the execution of the said will and codicil, as well as before and at all times, under the undue control and influence of her nephew the writer (as respondent believes) of the pretended codicil, and that she was, from and after the 27th of July until her death, wholly confined to her bed.”

The answers, therefore, admit to a qualified extent the capacity of the deceased; they admit that she did execute these papers, and was at the time cognizant of what she was doing, but allege, that the deceased was at such time under the control, that is, acting under coercion of her nephew, the party propounding these papers, or paper,—for both are written on one and the same sheet of paper.

Now, where coercion in procuring the execution of a paper is charged, it is necessary for the party alleging it, to make his charge good by proof; for the Court cannot assume, that because a party is a legatee to a large amount under a will, therefore that party has exercised coercion, to obtain the will from a testatrix:—a person otherwise admitted to have been of sufficient capacity to make a will. Nothing has been pleaded, or has come out in the evidence, by which coercion can be assumed.

Can the Court then pronounce against the legal

1843. validity of a will, executed by a party, to all ap
 February 13th. pearance, of perfect capacity, and executed in th
 BIDDLES presence of witnesses, merely because it is suggeste
 against —such suggestion not being in plea—that ther
 BIDDLES. was coercion in the procurement of the will. Tw
 most respectable witnesses, depose that the decease
 herself asked them to sign her will, and herse
 produced this paper to them as her will. Is th
 Court to assume coercion from the paper itself
 What was the situation of this lady? it appears th
 she had three natural children, to whom, by
 former will, she had given her property, contingen
 on their attaining the age of twenty-one: the cor
 tents of this paper it is not necessary to consid
 more particularly; undoubtedly it was the intenc
 of the deceased to provide for these children, an
 to give the bulk of her property among them.
 fourth child was afterwards born, which the d
 ceased spoke of as her child, and also as the chil
 of Thomas Biddles, her nephew; it is, howeve
 right to say, that there is no evidence whatever,
 this cause, to show that this child was the child
 Thomas Biddles, the nephew. In consequence
 the birth of this child it became necessary that th
 deceased should make some provision for it, an
 therefore, to alter the disposition of her property
 the will now propounded was accordingly made
 and this child is provided for by a legacy of 1000l
 and the residue of the deceased's property is give
 between this child and the three elder children
 with benefit of survivorship; and, in case of th
 death of all the children under twenty-one years
 age, the whole of her property is to go to h
 nephew, Thomas Biddles. Undoubtedly this is
 different disposition of the residue of her property

from what the deceased had made by her former will; and a disposition very much in the favour of Thomas Biddles, the nephew; but I must assume that deceased had some reason for this, and that, at the time of making this second will, he stood in a greater degree of favour with her, than at the time when she made her former will.

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Then comes the codicil, by which 5000*l.* is given to Mr. Thomas Biddles, the nephew.

On this instrument the question turns.

Undoubtedly, as I have before said, where coercion, in procuring a will, is set up, as a ground why the Court should refuse to establish a will, the Court will require the coercion to be proved by strong evidence, but, in the evidence now before the Court, there is nothing whatever on which to hang a doubt. The deceased produces this will from her pocket, she tells the witnesses she has altered her will, she asks them to attest it, and herself takes possession of it when they have attested.

It has been said in argument, that the codicil is in a different handwriting from that of the will; this is rather suggested than positively stated by the answers; who prepared the will or the codicil is not a fact before the Court; the party propounding the papers was not called on to plead or prove this: all that is necessary to establish a will or codicil, is, to shew it to be duly executed and attested, and to be the free voluntary act of a person of sound mind, memory, and understanding. There is no reason to doubt that all these requisites concurred in this case; it cannot be said that the deceased did not conduct herself rationally. Mr. Thomas Biddles, the nephew, is proved not to have interfered during

1843. the ceremony attendant on the execution of 1
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It has been said, that there are erasures on face of this codicil, that the words "*five thousand*" have been substituted for "*six hundred*;" the witnesses have been cross-examined as to this point and they both do pretend to discover something odd in the writing; but they do not pretend to say that this particular substitution of one sum for another is discernible.

I must say, that looking to the paper now before me, I cannot discover anything of the sort.

I pronounce for this will; I cannot give the party opposing it his costs, but I will not condemn him in costs.

1843. The Countess DE ZICHY FERRARIS and J. V.
March 17th. CROKER *against* the Marquis of HERTFORD.

A will is not
valid unless
executed in
conformity
with the law

prevailing in the country where the testator is domiciled; and the fact of the property (personally bequeathed by such will, being locally situate in another country, and of the will being duly executed according to the law of that country, will work no distinction.

A testator, by will, duly executed in the year 1823, directed his executors to pay legacies which he should give by any testamentary writings signed by him, whether witnessed or unwitnessed. *Held*, that such clause could not give effect to legacies bequeathed by an unattested paper subsequently to the 1 Vict. c. 26.

A testator, previous to the 1st of January, 1838, had made a will and several codicils; all duly executed, others only signed by the testator. Subsequently to the 1st of January, 1838, he made and signed a codicil (B), but the same was not duly attested. Subsequently to the 1st of January, 1838, by a codicil (C) duly executed and attested, he ratified and confirmed his will and "codicil B," that the codicil (B) was not so identified with (C), as to be ratified by, or incorporated in (C), the word "*codicils*" being more completely and properly applicable to the codicils made previously to the 1st of January, 1838.

The 1 Vict. c. 26, applies to wills made previous to the 1st of January, 1838, if any alteration is made therein after that time.

1st of March, 1842, having made several testamentary papers, to wit:—

(A.) A will, dated 25th of February, 1823, duly executed and attested.

Twenty-nine codicils of various dates, but all dated prior to the 1st of January, 1838. Some signed only by the testator, others duly executed and attested.

(B.) A codicil, dated 28th of October, 1838, signed by the Marquis, but unattested.

(C.) Ditto, dated 26th of April, 1839, duly executed and attested.

(D.) Ditto, dated 13th of August, 1839, signed by the Marquis, but unattested.

(E.) Ditto, dated 20th of May, signed by the Marquis, but unattested.

By his will the Marquis appointed his son, Lord Yarmouth (the present Marquis of Hertford), Lord Lowther, Mr. J. W. Croker, Mr. Hopkinson, Mr. de Horsey, and Captain Meynell, to be his executors.

In the month of June, 1842, probate of the will; of the twenty-nine codicils made previous to the 1st of January, 1838; and of the codicil of the 26th of April, 1839, (C), (the present Marquis of Hertford having renounced probate) were granted to the five other executors.

The will (A) contained (*inter alia*) the following clauses:—

“Whereas I have heretofore made several codicils or testamentary papers, which it is my wish shall be considered as part of my will, now I do hereby ratify and confirm all and every such codicils and testamentary writings.”

“I direct my executors to pay the several lega-

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cies given by this my will, or by such codicils testamentary papers as aforesaid, or which I sh give by any codicils or testamentary writings und my hand, or signed by me, and whether witness or not."

" I hereby ratify and confirm all codicils a testamentary writings as aforesaid, which I wish be considered as if incorporated in this my will."

Paper (B), all in the handwriting of the testat was as follows :—

" I hereby give and bequeath to Charlo Countess of Zichy Ferraris, to be held by her her own sole and separate use, the stock or sha of which I may die possessed in the United Sta Bank, which now, I believe, exceed three thousan Milan, October 28th, 1838.—Hertford.—And I a give and bequeath to my friend, the Right Hon. Jæ Wilson Croker, all my stock and shares in the Virginia United States Bank, which, I think, are a hundred thousand dollars.—Hertford.—Octol 28th, 1838, Milan."

Paper (C) was as follows :—

" I had in former codicils given as much as po sible to Lady S——, now I wish to withdraw a except 700*l.* a-year, which, under my old famil settlement, I am entitled to bequeath to any f life. I direct this to be a first and primary cha upon all the manors in the county of Warwick which I am absolutely entitled, and over which have a disposing power, and I hereby ratify a confirm my said will and codicils, except as befo excepted."

(Signed and duly attested.)

Paper (D)—all in the testator's handwriting.

"This is a codicil to the last will and testament of Francis Charles Lord Hertford. For several years I have thought of and frequently altered my decisions about the Regent's Park, but now it becomes me to settle; so I give my leasehold house and premises, and all it contains, excepting plate and two old entailed pictures by Canaletti, to Charlotte Countess Zichy Ferraris, and to her heirs and assigns. In testimony of which I sign this codicil, this 13th August, 1839.—Hertford—."

Paper (E), all in the testator's handwriting.

"I have also one thousand pounds of long annuities, which is a stock for about thirty years longer; this I give and bequeath to Charlotte Zichy Ferraris, my ward. And I declare this a codicil, as if it formed part of my will and testament. May 20th, 1840,—Hertford—."

The Countess De Zichy Ferraris called on the executors to take probate of papers (B, D, and E). Mr. Croker called on his co-executors to join with him in taking probate of paper (B). The four other executors having declined to take probate of any of these papers, and Mr. Croker declining to take probate of any but (B), the Countess De Zichy Ferraris propounded papers (B, D, and E), in an allegation which pleaded (*inter alia*) 3rd article.

"That the testator, in the month of October, 1838, being resident at Milan, (a city in the Austrian dominions, and subject to the laws, usages, and customs of Austria) and in which city the said testator had a house and an establishment, and having a mind and intention to make an addition to his last will and testament, and codicils thereto, and meaning such addition to form part of his said

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will, and be incorporated therein, as expressed in his said will, did with his own hand draw up and reduce into writing the aforesaid codicil bearing date the 28th of October, 1838, and in testimony of his aforesaid intention that the same should form part of his said will, and be incorporated therein, he did on the said 28th day of October, 1838, being the day of the date thereof, execute the same, in conformity with the laws, usages, and customs of and in the form required and observed in the Austrian dominions, to wit, by setting and subscribing his title of honour or signature thereto, as the same now appears, as and for a further codicil or part of his will."

4th Article.—"That such codicil is a good and valid codicil by the laws, usages, and customs of Austria, and that the law of Austria would give effect to such a paper."

[The opinions of Advocates and Lawyers of the country were vouched in support of this article.]

5th Article.—"That the testator being of sound mind, memory, and understanding, and having an intention to make an addition to his aforesaid last will and testament, and, among other things, to ratify and confirm the same, and the codicils thereto and, among others, the codicil of the 28th of October, 1838, did with his own hand draw up and reduce into writing a further codicil to his said will bearing date, the 26th of April, 1839; and duly executed the said codicil in the presence, &c. And the said testator in and by the said codicil ratified his said will and codicils, and, among others, the codicil bearing date the 28th of October, 1838.

Mr. J. W. Croker propounded paper (B) in a separate

rate allegation, substantially the same as that on behalf of the Countess De Zichy Ferraris, but pleading in addition,

“That the whole of the stock, shares, goods, or property in and by the said codicil bequeathed, (whether to Mr. Croker, or to the Countess) was, at the time of the making of the said codicil, and still is locally situated in the United States of America only, and not elsewhere.

The admission of these two allegations was opposed by the present Marquis of Hertford, the residuary legatee, named in the will.

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Jenner and *Elphinstone* for the residuary legatee.

The *Queen's Advocate* and *Haggard*, for the Countess De Zichy Ferraris.

Harding and *R. Phillimore*, for Mr. Croker.

Addams for the executors, who appeared formally.

The points discussed in argument were (a)

1st. The law, arising from the fact of paper (B) being made at Milan, at a time when the testator was resident in that city, occupying a house, and having an establishment there.

The cases cited on this point were *Stanley v. Bernes* (b). The *Annandale Peerage case* (c).

2nd. The fact, of the stock and shares, be-

(a) *Jenner* objected to the Counsel for the Countess De Zichy Ferraris being heard in support of paper (B); he submitted that a legatee is not entitled to be heard in support of a paper which an executor is propounding. The Court overruled the objection.

(b) 3 Hagg. 373.

(c) 3 Ves. 198.

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queathed by paper (B), being locally situate in America. Cases cited. *Re Moresby* (a), *Stanley v. Bernes* (b), *Burge on Colonial Law* (c), *Story on Conflict of Laws* (d).

3d. The law, arising from the fact of the will (A) having reserved power to bequeath future legacies and the legal effect on papers (B, D, E.) Case cited. *Habergham v. Vincent* (e), *Rose v. Cunynghame* (f), *Hooper v. Goodwin* (g).

4th. The law, arising from the confirmation, of paper (C), of the will and codicils, and its legal effect on paper (B). Cases cited. *Habergham v. Vincent* (h), *Smart v. Prujean* (i), *De Bathe v. Fingal* (j), *Wilkinson v. Adam* (k), *Dillon v. Harris* (l), *Utterton v. Robins* (m), *Doe v. Evans* (n), *Shortrede v. Cheek* (o), *Guest v. Willasey* (p), *Boydell v. Drummond* (q), *Barnes v. Crowe* (r), *Piggot v. Waller* (s), *Goodright v. Meredith* (t), *Hulme v. Heygate* (u), *Gordon v. Lord Reay* (x), *Crosby v. M'Dowal* (y), *Jackson v. Hurlock* (z), *Williams v. Goodtitle* (aa), *Carleton v. Griffin* (bb), *Isre Smith* (cc), *Brudenell v. Boughton* (dd), *Money penny v. Bristow* (ee), *Buckeridge v. Ingram* (ff).

5th. The application of the act of the 1st Vic. c. 26, to testamentary papers made prior to the

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|--------------------------|-----------------------|-----------------------|
| (a) 1 Hagg. 378. | (j) 16 Ves. 167. | (t) 2 Maule & Sel. 5 |
| (b) 3 Hagg. 373. | (k) 1 Ves. jun. 422. | (u) 1 Mer. 285. |
| (c) 4 Vol. pt. 2, c. 12. | (l) 4 Bligh, 321. | (x) 5 Sim. 274. |
| (d) pp. 78-678. | (m) 1 Ad. & Ell. 423. | (y) 4 Ves. 610. |
| (e) 2 Ves. jun. 204, | (n) 1 Cr. & Me. 42. | (z) 2 Eden, 271. |
| 4 B. C. C. 353. | (o) 1 Ad. & Ell. 57. | (aa) 10 B. & Cres. 89 |
| (f) 12 Ves. 29. | (p) 2 Bing. 429; | (bb) 1 Burr. 555. |
| (g) 18 Ves. 156. | 3 Bing. 614. | (cc) 2 Curt. 796. |
| (h) 2 Ves. jun. 204; | (q) 11 East, 142. | (dd) 2 Atk. 272. |
| 4 B. C. C. 353. | (r) 1 Ves. jun. 490. | (ee) 2 R. & Myl. 117 |
| (i) 6 Ves. 560. | (s) 7 Ves. 98. | (ff) 2 Ves. jun. 651 |

1st of January, 1838. Cases cited. *Hobbs v. Knight* (a), *Brooke v. Kent* (b). 1843.

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JUDGMENT.

SIR HERBERT JENNER FUST.

In this case, the late Marquis of Hertford is the deceased; he died on the 1st of March, in the last year, at his house in Park Lane. He left a will, and a great number of codicils; the will is dated in January, 1823, and the codicils are dated at various periods between that year and his death. Some of the codicils are in the handwriting of the deceased, and signed with his title of honour; some of them are not attested by any witness, and some are duly attested, having been executed according to the law then in existence to pass real property, that is, they were executed in the presence of three subscribed witnesses. In the last year, probate of the will and of all the codicils dated before the 1st of January, 1838, and of one of a later date, (November, 1839,) which was duly executed by the Marquis and attested, was granted to the executors, who are five in number, Lord Lowther, Mr. Croker, Mr. Hopkinson, Mr. de Horsey, and Captain Meynell, and the Court reserved for future consideration the papers of a testamentary nature dated subsequently to the 1st of January, 1838, and which are not attested.

Now these codicils are three in number: one is dated at Milan, in October, 1838; the second is dated in August, 1839, and the third in May, 1840. These papers are all in the handwriting of

(a) 1 Curt. 768.

(b) Priv. Coun., unreported.

1843. the deceased Marquis, and are signed by him, but—
 March 17th. they are not attested by any witness; and it is—
 The Countess with respect to these papers that the question has—
 DE ZICHY arisen. Four of the executors (Lord Lowther,
 FERRARIS Mr. Hopkinson, Mr. de Horsey, and Captain Mey—
 and nell) have determined not to propound these papers,
 J. W. CROKER but are willing to take probate of them if the Court
 against is of opinion that they are entitled to probate; these
 The Marquis of four gentlemen, therefore, are no parties to the
 HERTFORD. present proceeding, being entirely neutral before
 the Court. The purport of the papers is to give
 legacies of considerable amount to the Countess de
 Zichy Ferraris and Mr. Croker, (Mr. Croker being
 an executor under the will and the other codicils),
 and the present proceeding is on behalf of the
 Countess and Mr. Croker. The present Marquis of
 Hertford, who is residuary legatee under the will,
 is a party to the suit, and opposes the grant of pro-
 bate to these papers. The Countess de Zichy Fer-
 raris and Mr. Croker have appeared by separate
 proctors and counsel, and each has given in a sepa-
 rate allegation. Mr. Croker joins in propounding
 the paper of the 28th of October, 1838, and the
 Countess propounds the other two papers, their
 allegations being substantially the same, and having
 the same object, namely, to bring before the Court
 the circumstances under which it is considered that
 the papers are entitled to probate, though not exe-
 cuted according to the provisions of the statute
 1 Vict. c. 26, which passed in July 1837, and came
 into operation on the 1st of January, 1838, eight
 or nine months before the earliest of these papers
 is dated.

Prior to entering into a consideration of the con-

tents of the Allegation, it may not be immaterial to **see** how the law stood before the passing of the statute I have referred to, and to consider the alterations which are introduced into our testamentary law by that statute, so far as they apply to the present question ; and I do this because a great many questions turned upon the construction of the Statute of Frauds (the 29 Car. 2, c. 3), in the different courts of law and equity. Under the present act, the same provisions are applied to both description of property, real and personal.

By the 5th section of the Statute of Frauds, it was enacted, that "all devises and bequests of any lands or tenements devisable either by force of the Statute of Wills, or by this statute, or by the force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses." With regard to wills of personal property, they were not required to be signed or attested ; it was sufficient that a will was reduced into writing in the lifetime of the testator, and that it contained his real wishes and intentions.

Under the old law, therefore, beyond all doubt or contradiction, any testamentary paper or writing of the deceased, signed by him, would be a good disposition of his personal property to any amount ; and consequently, if the law had remained unaltered, the codicils now propounded would be entitled to probate as well as those of which probate has been already granted. But it was thought that

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1843. from the great increase of personal property in the country, and from the numerous suits which were the consequence of the Ecclesiastical Courts granting probate of unfinished papers, which gave rise to questions of great difficulty, some further protection was necessary to prevent fraud being practised upon persons who had property of this kind to dispose of, and accordingly it was proposed and recommended by the Ecclesiastical Commissioners and the Real Property Commissioners, that certain alterations of the law were necessary to be made, and they suggested another mode of executing wills, by which the Ecclesiastical Courts and the Courts of Common Law should be governed in both cases, in respect to the execution and attestation of wills. The Legislature did not adopt the whole of the commissioners' suggestions, but the act of parliament of the 1st Victoria was founded in part upon their recommendations, and it is now necessary to consider what the law is as it at present exists.

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Now the ninth section of the act, which is that which immediately relates to the question before the Court, enacts, "That no will shall be valid unless it shall be in writing, and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot or end thereof, by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." This is what is required

for the execution and attestation of wills, and under the term "wills," the Court has already held that codicils are included. It seems difficult therefore to suggest any words more plain, simple, and comprehensive than the words of this section in the Act of Parliament; and it is absolutely impossible, in the ordinary sense and meaning attached to the expressions, to raise any question with respect to the true import and construction of this section of the statute. A will, codicil, or other testamentary paper, must be signed at the foot or end by the testator, or by some other person in his presence and by his direction; and not the *will*, but the *signature*, must be made or acknowledged by him in the presence of two witnesses present at the same time, who are to subscribe the will in the presence of the testator: it must not be attested by one witness at one time and by one at another; but the will must be executed in the presence of both of the witnesses, and be attested by those witnesses in the presence of the testator; and any disposition of property, real or personal, other than in the form prescribed by this Act of Parliament will not be deemed valid.

Under the Statute of Frauds, with respect to wills of real property, many questions of great intricacy and difficulty arose, and amongst other questions were these: What amounted to signing by a testator; whether it was sufficient if he made his mark, or if he executed by sealing; whether the name should be subscribed at the bottom of the will, or might be placed at any other part; whether it was necessary that the witnesses should see the testator sign, or if it was sufficient that he

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1843. acknowledged his signature or the will in the presence ; what amounted to a sufficient acknowledgment ; whether it was necessary that the acknowledgment should be made to all the witnesses at one and the same time, or if it was sufficient him to sign in the presence of one witness, and acknowledge the will to the two other witnesses, at different times : And another very important question which arose under that statute was, whether an unattested codicil, clearly identified by a subsequent will duly attested, was valid. Many other nice and difficult questions arose under the Statute of Frauds, and although many of them have been set at rest by the 9th section of the late Act of Parliament, still, as every day's experience shows, quite a sufficient number remains undisposed of, to afford scope to much ingenious speculation and argument as to the real intent and meaning of the very plain and simple directions of this section of the act ; and as wills of real and personal property are now under the same rules, and as the same principles apply to wills of personal estate as to wills of realty, the Court has endeavoured, in putting an interpretation upon this section of the act, to discover, as well as it can, the construction adopted by courts of common law and equity, in cases which arose within their jurisdiction, that is, in respect to wills of real property.

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A question of this kind comes now before the Court, which has to give its opinion as to the effect of these papers, *proprio vigore*, under circumstances to which the Court will advert, and these circumstances are set forth in the allegations, which have been discussed in this Court. In looking to the

allegations, both on behalf of the Countess de Zichy 1843.
 Ferraris and of Mr. Croker, the same questions March 17th.
 necessarily arise: the cases are in substance exactly The Countess
 the same, though one or two points are stated in DE ZICHY
 one which are not in the other. FERRARIS

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The first of the papers in question was executed at Milan, not within the dominions of her Majesty, and it purports to dispose of property situated in the United States of America; and it is said that, by his will, which the deceased duly executed, he reserved to himself the power of disposing of property by any codicil or testamentary writing under his hand or signed by him, though not attested by witnesses, and that the unattested papers were confirmed and ratified by a codicil of subsequent date duly executed, whereby the defect of execution was supplied. With respect to the first point, as to the place where the first paper bears date, it may not be immaterial to look at the papers themselves. The first paper is dated, I said, at Milan, October 28th, 1838, and it is to this effect: "I hereby give and bequeath to Charlotte Countess of Zichy Ferraris, to be held by her for her own sole and separate use, the stock or shares of which I may die possessed in the United States Bank, which now, I believe, exceed three thousand." Then follow the signature "Hertford," and the date, "Milan, October 28th, 1838." The instrument is written on part of a small sheet of paper, apparently part of a copy book, and then follow these words: "And I also give and bequeath to my friend, Right Honourable John Wilson Croker, all my stock and shares in the Virginia United States Stock, which, I think, are one hundred thousand

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dollars;" this is signed "Hertford," and dated
"October 28th, 1858, Milan." The second paper
is dated the 13th of August, 1839, and is to this
effect: "This is a codicil to the last will and testa-
ment of Francis Charles Lord Hertford. In several
years, I have thought of and frequently altered my
decisions about the Regent's Park; but as now my
youngest ward is about forming an excellent match
and having lost my two very old four-legged
friends, it becomes me to settle; so I give my
leasehold house and premises and all it contains,
excepting plate and two old entailed pictures by
Caneletti, to Charlotte Countess Zichy Ferraris,
and to her heirs and assigns. In testimony of
which I sign this codicil this thirteenth August,
1839. Hertford." At the bottom, "A second
copy, similar, but not copied verbatim. H." The
third codicil is to this effect: "I have also one
thousand pounds of Long Annuity, which is a stock
for about thirty years longer; this I give and be-
queath to Charlotte Zichy Ferraris, my ward; and
I declare this a codicil as if it formed part of my
will and testament, May 20th, 1840," and it is
subscribed "Hertford."

These, therefore, are the three papers on which
the opinion of the Court is to be given; and, looking
at the date of the papers simply, it is clear that they
are not entitled to probate, as not having been
executed according to the provisions of the statute
by which the Court is now to be governed.
Now it is very material to inquire with respect
to the first of these papers, it having been execu-
ted out of Her Majesty's dominions, as to the rules
which apply to papers so executed, and what effect

The Court is to give to that circumstance. Now,
 the allegation given in by the Countess de Zichy
 Ferraris, the first given in in the cause, pleads the
 death of the testator in the month of March, 1842,
 and that he made his last will, February 25th,
 1823, with several codicils annexed to it, and that
 he nominated and appointed his son, Lord Yar-
 mouth, residuary legatee; that probate of the will
 and twenty-nine codicils was by this Court, in
 June, 1842, decreed to the executors. The second
 Article pleads a clause in the will of the testator, to
 which the Court will presently refer further than is
 necessary at present, merely stating that by this
 Article of the allegation it is pleaded that the tes-
 tator directed by his will certain legacies to be paid
 which were or should be bequeathed by any codicils
 annexed to his will, or executed after the date of
 the will, and if they were merely signed by him,
 and not attested by witnesses. The third pleads
 "that the testator, in the month of October, 1838,
 being resident at Milan (a city in the Austrian
 dominions, and subject to the laws, usages, and
 customs of Austria), and in which city the testator
 frequently resided, and had a house and an esta-
 blishment, did with his own hand draw up and
 reduce into writing the codicil bearing date the
 28th of October, 1838;" and it pleads that he
 intended that this codicil should form part of his
 will, and be incorporated therewith; and that he
 executed the same in conformity with the laws,
 usages, and customs of and in the form required
 and observed in making wills and testamentary
 dispositions in the Austrian dominions, by setting
 and subscribing his title of honour or signature

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1843. thereto, as and for a further codicil to his will, and
 March 17th. that he did bequeath and dispose of his property
 as in the codicil is contained. The fourth Article
 The Countess as in the codicil is contained. The fourth Article
 De ZICHY pleads that the codicil is a good and valid codicil
 FERRARIS by the laws of Austria, and that no formalities are
 and required to give effect to the paper, and the
 J. W. CROKER by the laws of Austria, and that no formalities are
 against required to give effect to the paper, and the
 The Marquis of opinions of judges, advocates, and lawyers in the
 HARTFORD. Austrian dominions are adverted to. The fifth
 Article repeats what is pleaded in other articles ;
 namely, that the testator was of sound mind, me-
 mory, and understanding, and being so, that he
 made the codicil of the 26th April, 1839, (one of
 the papers of which probate has already been taken)
 and it is pleaded that "having a mind and inten-
 tion to make an addition to his will, and amongst
 other things to ratify and confirm the same, and
 the codicils thereto, and amongst others the said
 codicil bearing date the 23th of October, 1838, did
 with his own hand draw up and reduce into writing
 a further codicil to his will, bearing date the 26th
 of April, 1839, now remaining in the registry
 of this Court, (the codicil (C)), and duly exe-
 cuted the said codicil, in the presence of divers
 credible witnesses, two of whom, in his presence,
 set and subscribed their names as witnesses thereto,"
 and of which probate has been granted by this
 Court, and that in this codicil are the following
 words: "I ratify and confirm my said will and
 codicils, except as before excepted, in every other
 respect;" that is said, with reference to certain of the
 papers in which he had made alterations in his
 testamentary disposition, and which he had revoked
 by this codicil of 26th of April, 1839 ; but he rati-
 fies and confirms his will and codicils, "except as

before excepted, in every other respect." It goes on to plead in the sixth article, that in August, 1839, he executed another codicil, that is by drawing it up with his own hand, and setting and subscribing thereto his title of honour or signature, intending the same to form part of and to be incorporated with his last will and testament, and to dispose of his property as before pleaded. The seventh Article pleads that the testator, having a mind and intention to make a further addition to his will, with his own hand wrote the codicil of the 8th November, 1839, and duly executed the same in the presence of divers credible witnesses, two of whom, in his presence, set and subscribed their names as witnesses thereto, of which codicil also probate has been granted by this Court. It then pleads the making and execution of the codicil of the 20th of May, 1840, which it is also pleaded the testator intended should form part of his will and be incorporated therewith. The ninth Article pleads that the three codicils, and the codicil in the registry of the Court annexed to an affidavit of scripts referred to, are in the handwriting of the deceased.

These are the contents of the allegation given in by the Countess de Zichy Ferraris; and Mr. Croker's allegation does not in any material degree differ from it, except that it pleads, in the fourth Article, "That the whole of the stock, shares, goods, or property, in and by the said codicil bequeathed (whether to the Right Honourable John Wilson Croker, party in the cause, or to the Countess de Zichy Ferraris) was at the time of the making of the said codicil, and still is, locally situated in the United States of America only, and not elsewhere."

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Now, the first question which the Court has to consider is: What is the effect, of the fact of the paper of October, 1838, having been executed when the testator was resident at Milan? Whether that circumstance exempted him from the necessity of conforming to the law of this country, which now requires that a will of personal property, as well as a will of real property, should be executed in the presence of and attested by two witnesses. It is not pleaded that the late Marquis was domiciled at Milan; it is only pleaded that he was resident there, as a visitor, as he might have been in any other country, and therefore merely a temporary resident, having his domicile in this country, and therefore he was liable to the law of this country with respect to his testamentary disposition. The law of Austria, it is pleaded, would give effect to this codicil, as the act of a foreign resident there, and this may be perfectly true; but if the law of Austria would give effect to the paper, it does not follow that this Court could decree probate of the paper, unless it can be shown that the domicile of the party was in those dominions, and not in the dominions of England, because the domicile of the Marquis was in England; for it is too late now to contend that the succession to personal property, either in cases of testacy or intestacy, is to be governed by any other law than the law of the country in which the deceased had his domicile. In the case of succession to the personal estate of an intestate, the cases are too numerous for the Court to entertain any doubt that the succession is governed by the law of the domicile; and if there had been any doubt whether the succession to personal property in a case of

testacy is governed by the same rule, such doubt would be removed by the decision of the Court of Delegates, in the case of *Stanley v. Bernes* (a). It was there decided that a British-born subject, who had domiciled himself in Portugal, was bound, in the disposition of his property, to conform to the law of the country in which he had become so domiciled; and although in that case he had expressed an intention of returning to this country, yet, as he died in Portugal, a domiciled Portuguese subject, the Court held that his will could not be valid, unless executed according to the law of the country in which he was domiciled. Therefore that case disposes of the whole question as to succession in cases of testacy, deciding that a will, to be valid, must be executed according to the law of the country where the party was domiciled; and, following that decision, I am bound to administer the law as I find it laid down by the superior Court, as the law of the country, and I am consequently of opinion that the circumstance of the paper having been written and executed by the late Marquis at Milan can give no effect to the paper, it not being executed according to the law of the country in which it is admitted that he had his domicile.

Now this goes, in some degree, to dispose of the next question, arising from the locality of the property disposed of: Whether property situated in the United States of America can be disposed of by a will executed in any other manner than the law of the domicile requires; and I am of opinion that it is clearly established by all the cases, beyond all

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(a) 3 Hagg. 373.

1843. doubt, that the law of the domicile governs, and not the *lex loci rei sitæ*. In the case of *Stanley v. Bernes* this question was likewise examined, and it was determined upon the principle *mobilia sequuntur personam*, that the disposition is governed by the law of the country where the party is domiciled, though the *lex loci* may regulate the grant of administration. The rule is, in cases of the wills of Scotchmen, where the property is in this country, to come to this Court for administration; but the Court always follows the law of the domicile, acquainting itself with the fact whether the testamentary disposition is valid according to the law of the domicile; and it comes to this: that the locality of the property may so far be material that it enters into the consideration of the Court in the grant of administration. If there be any difference in this respect,—if it is necessary to have probate of this paper, though the property is situated in the United States, and if the courts of America do not adopt the rules which are acted upon in this Court—it is competent to the Courts in that country to grant administration; but this Court, when probate is asked in this country, must govern itself by the law of this country, and cannot grant probate of a paper not legally executed according to the law of this country.

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These are the observations of the Court on two questions in this case, namely, as to the place where the paper was executed, and as to the locality in which the property is situated: neither of these circumstances, nor both together, can render the instrument effectual.

The third question is as to the clause in the will of the Marquis of Hertford in the second Article of

the Allegation, "That the testator in and by his will, amongst other things, gave and bequeathed all other his personal estate and effects whatsoever which he had not by any former codicil or codicils or testamentary writing confirmed by his will, disposed of specifically, or which he had not by his will, or should not by any codicil or testamentary writing, dispose of specifically, to his executors, upon trust to dispose of the same in the following words: 'and pay, satisfy, and discharge the several legacies and annuities given and bequeathed by this my will, or such codicils or testamentary papers as aforesaid, or which I shall or may give or bequeath by any codicil or codicils hereto, or by any testamentary writing or writings under my hand or signed by me, and whether witnessed or not, and do and shall stand possessed of and interested in all the surplus or residue of the monies in trust for my son Richard Seymour Conway, Earl of Yarmouth, his executors, administrators, and assigns: Provided always, and I do hereby declare my will and mind to be, and I hereby direct, that my son shall, upon receiving from my executors hereafter named, or the survivors of them, or the executors, administrators, or assigns of such survivors, a request for such purpose in writing, within twelve calendar months from my decease, forthwith, with all convenient expedition, make, do, and execute, all such acts, deeds, matters, and things as may be required of him and in his power to do, for giving full effect to every appointment, direction, devise, or bequest in this my will, or any codicil or codicils, or other testamentary writing, which I have already heretofore made, and may be now subsisting, or may now or

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1843. hereafter make, and for giving full effect to ever
 March 17th. bond or instrument or written promise which I have
 The Countess executed or signed, or may hereafter execute and
 DE ZICHY sign, and which shall be subsisting at my decease
 FERRARIS for the purpose of securing any principal or annual
 and sum of money to, or in favour of any person or per-
 J. W. CROKER sons whomsoever; and in case my son shall neglect
 against or refuse to do so, I hereby declare and direct that
 The Marquis of the bequest and trust hereinbefore made and di-
 HERTFORD. rected, as to the surplus of my residuary personal
 estate, and of the surplus of the sum of forty-seven
 thousand pounds and interest to or in favour of my
 son, shall be absolutely void; and in such case I
 direct that the surplus of my residuary personal
 estate shall be paid to the commissioners for the time
 being appointed for the reduction of the National
 Debt.' And at the conclusion of the will, the de-
 ceased ratified and confirmed this will and codicils
 in the words following: 'And hereby revoking all
 former wills, but ratifying and confirming all codi-
 cils and testamentary papers as aforesaid, which I
 wish to be considered as if incorporated in this my
 will, I declare this to be my last will and testament,'
 as in and by the will now on record in the registry
 of the Prerogative Court of Canterbury will appear."
 Now the question is, what is the effect of this
 clause?

The purport of the clause is to revoke all former wills, but to ratify and confirm all codicils which he may have executed, and he directs that all future codicils executed by him should be incorporated with and form part of his will. Now, the effect of the clause itself shows, without reference to any extrinsic circumstances, its meaning to be this,—

an intimation and direction to his executors, that he intended to except from the clause of revocation in his will, which is revocatory of all former wills, but not all former codicils, certain memoranda—for he refers to papers and instruments in existence which are not codicils, and also an intimation to his executors that, if he should leave behind him any papers of a testamentary kind, dated after the date of the will, which should be merely signed by him, and not attested by witnesses, they were nevertheless to be considered as good and valid codicils,—an intimation and direction that he meant to reserve to himself a power of disposition in some other form, but which was then valid by the law of this country, for it was not in any degree necessary, as the law then stood, that he should have reserved any such power, as the law itself would have given effect to any instrument in his own handwriting; and a codicil signed by him with his title of honour would have been entitled to probate, and would have been as effectual, so far as his personal property was concerned, as if it had been formally executed by him, and attested by three witnesses: and therefore there was no necessity for a reservation of any such power to himself: and therefore, looking at this clause of the will, I consider it as an intimation and direction to his executors, that any codicils not attested by witnesses were meant and intended to be a good disposition of his personal property. Having executed his will in the presence of three witnesses, he might think it necessary with respect to these papers, which are not executed like his will in the presence of witnesses, to intimate to his executors that any codicils in his handwriting and

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signed by him, though unattested by witness—
should nevertheless form part of his will and testamentary disposition. But, taking the description of the codicils as given by the learned counsel on both sides, it would seem that the clause in the will was to give himself the power of disposing of property by an unexecuted codicil; and seeing that the law, before the date of these codicils, has been altered, and that it is no longer competent to a British subject to dispose of his property in any other manner than by a will or codicil executed according to the provisions of the 9th section of the act of Victoria,—the question is, had he, or could he reserve to himself, such power—a power of disposing of his property in any other manner than such as by the law of this country a domiciled subject could be authorized to do? A great deal of ingenuity and learning was displayed in the argument which was addressed to the Court as to the law which applies to these cases, and a vast number of cases were cited, which were supposed to affirm the power which the deceased would seem to have reserved to himself; and the general result of these cases appears to be this, and looking by analogy to the decisions in Courts of equity and law, as to the dispositions of real property,—that, notwithstanding the Statute of Frauds has said that all devises of lands shall be invalid unless they were executed in the presence of witnesses, yet, nevertheless, it has been held by Courts of common law and equity, that a codicil or paper unattested may be held sufficient under certain circumstances, that is, that a paper duly executed may so clearly and indisputably refer to an unexecuted paper, that such a paper, whether

of a testamentary form and character or not, may be so clearly and indisputably referred to, as to be considered as identified with and to form part of the will duly executed, just in the same manner as if it had been repeated *totidem verbis* in the will itself. That, I think, is the general result of the cases. It would be quite useless for the Court to go through all the cases that were cited in the argument: the general result is this,—that, with regard to the incorporation of papers, a paper imperfect in itself may be so identified in an instrument validly executed, that it may be considered as a part of it, and consequently that the defect of authentication by the attestation of witnesses subscribed to the paper is cured.

The case of *Habergham v. Vincent* (a), was decided upon this principle; and it may be necessary to consider that case, and the principles upon which it was determined, and what fell from the judges,—the Lord Chancellor and the learned judges by whom he was assisted on that occasion. That case was carefully considered, and a great number of cases which preceded it were cited in the report.

That case occurred in 1793, and it appears from the report that the testator, Samuel Hill, made his will on the 5th of October, 1759, whereby he devised all the copyhold estates which he had surrendered to the use of his will, and also all his freehold estates, to five persons named in the will, upon trust; “subject and liable to such charges, provisoes, and conditions, as he should by any deed or instrument in writing, to be executed by him

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(a) 2 Ves, jun. 204.

1843. and attested by two or more credible witnesses—
 March 17th. direct, limit, or appoint." Therefore the will $\subseteq$
 The Countess revised copyhold estates surrendered to the uses
 DE ZICHY the will and freehold estates subject to charges made
 FERRARIS by a deed or instrument in writing executed in $\blacksquare$
 and J. W. CROKER presence of and attested by two or more credible
 against The Marquis of witnesses. Now it appears that this will was drawn
 HERTFORD. up, executed and attested, and that by an instrument
 dated the following day, under the hand and seal
 of the testator, attested by two witnesses, stamped
 and concluding like a deed, he recited his will, and
 that he had reserved a power of disposing of his
 estate further, and directed his trustees to convey
 his real estate as therein mentioned; and as the
 deed was attested only by two witnesses, the question
 was, whether it could pass freehold property. Now
 the case came on first before Lord Thurlow, who
 after taking some time to consider, directed a case
 to be made for the opinion of the Court of King's
 Bench, whether the two instruments (the one a
 regularly executed will, the other drawn up as a
 deed) taken together were sufficient to pass any
 estate or interest in the freehold and copyhold pre-
 mises, or either of them, not given by the first in-
 strument, and whether, upon the death of the heir
 at-law any and what estate or interest in the freehold
 and copyhold premises, or either of them, passed
 by the two instruments to the surviving trustee, or
 would at his death pass to the person who should
 be his right heir. And it appears that when the
 case was sent for the opinion of the Court of King's
 Bench, in consequence of too short a statement of
 the case, the Court of King's Bench understood the
 second instrument merely as a deed, and reported

hat the two instruments could not be united, and
hat the two instruments taken together were not
ufficient to dispose of freehold or copyhold estate.
it appears that the trustee afterwards proved the
second instrument in the Ecclesiastical Court as
testamentary, and the cause was set down for further
directions, and a great deal of argument took place
as to the proper mode of proceeding; and after such
argument, the Lord Chancellor expressed his opin-
ion that it was right that the case should be further
argued before him, with the assistance of two judges
of the Common Law, and accordingly the case was
argued before him, with the assistance of Mr. Justice
Buller and Mr. Justice Wilson, and, after consider-
able discussion, the judges delivered their opinion.
The opinion of Mr. Justice Wilson is to this effect :
 “ Upon the first question, if the deed had not been
made, or being made as a deed it can have no
operation, there is a resulting trust for the heir,
who is entitled to the whole remaining beneficial
interest, and the trustee takes nothing. It was
then contended for the heir of the surviving trust-
ee, that this instrument, though the testator called
it a deed-poll; though it is stamped; though it
contains no nomination of executors, or terms
of gift, but of limitation and appointment, and
though it concludes like a deed, sealed and delivered,
being first duly stamped, yet may be, and if it may
be, ought to be considered as testamentary, so that
it may be connected with the will, and both may
make one testamentary disposition of the estate;
 and upon the best consideration my opinion is, that
 if this instrument, connected with the former, can
 have a legal operation to pass any part, I think it

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1843. may be so considered as testamentary." It had
 March 17th. been proved, as I understand, in the Ecclesiastical
 The Countess Court as testamentary. He goes on to say: "Be-
 DE ZICHY cause when the testator made his will, he disposed
 FERRARIS of his estate to a certain extent, and then professes
 and his intention to make a further disposition. It is
 J. W. CROKER true, he at the same time conceives, and erroneously
 against conceives, he could reserve a power by his will to
 The Marquis of limit and appoint uses out of his own estate by
 HERTFORD. deed or instrument attested by two witnesses only ;
 but he does not profess that he will do it by deed
 only ; therefore, it seems at the time he made his
 will, and when he wrote this instrument, his prin-
 cipal intention was, to complete what he had left
 incomplete by his will, viz. the disposition of his real
 estate. He had made his will in part, and then
 professed an intention to do more to complete that
 will ; but he could not do it by declaration of uses
 out of his own estate when no part was departed
 with by him. The law will not permit that, but it
 may be done by will ; and the general rule is, that
 when a man has expressed his intention to dispose
 of his estate, and has taken an ineffectual mode
 of doing it, yet if the instrument can be construed in
 another manner so as to effectuate his intention, the
 ceremony is matter of form, and the substance shall
 be carried into execution, if it may by law ;" and
 therefore, he considered that, under a deed, the
 testator's intention was to complete what he had left
 incomplete by his will. He goes on to say :
 " Though the testator has called this a deed, yet
 as the intention was to complete what was incomple-
 te by the will ; as it is in writing and signed, and
 as to some purposes, perhaps to all, it may have a leg-

operation if testamentary, in order to sustain the intention, it is fair so to consider it; and I do not know any rule that stands in the way." Now, so far he considered the deed had been or might be proved in the Ecclesiastical Court, or as entitled to probate, as part of the testamentary disposition of the testator, though drawn the day after the will was executed, and attested by two witnesses only. Mr. Justice Wilson then proceeded to the third question, as to the freehold. "It is contended that under the circumstances, and considering the two instruments as one instrument, the freehold estate will pass by these two taken together, though the latter is not properly executed to pass freehold. As to that, the first way in which it was considered, was, that where there is a prospective sort of limitation, as in this case, a prospective reference to something to be done, the party foregoes the benefit of the statute; and therefore the subsequent instrument he has mentioned shall have the same effect, though not properly attested, as if attested by three witnesses." In this case, of the Marquis of Hertford, if there was a prospective intention of making a codicil or codicils not to be executed according to law,—supposing it to be so, that is, not duly attested as by law then required,—the question would be the same; and on the same principle it might be said, that he had made a law for himself, and was willing to forego the benefit and protection afforded by the statute in the disposition of property, and therefore the paper ought to have the same effect as if attested by three witnesses. But Mr. Justice Wilson proceeds: "If the Statute of Frauds could be considered as that sort of law to which this maxim would apply '*quisquis renunciare*

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1843. *potest juri pro se introducto*, that would apply in this case; but the statute" (that is, the Statute of Frauds) "was not made for the benefit of the testator only, but for general public purposes. By the Common Law, a man could not devise land; then came the statute permitting him to do so by an instrument properly signed. Then, lest testators should be imposed upon, these guards were introduced by the Statute of Frauds, and that insists, that a will of land shall either be executed in the manner pointed out, or be void. This does not leave it at the option of the testator, but is a positive provision that a will shall be void if not executed according to that statute." So the words of the ninth section of the act of the first of her present Majesty declares, that no will or codicil shall be valid unless it shall be executed in the presence of witnesses and in the manner pointed out by that section of the act of Parliament; and that provision was made, not for the benefit of individuals, but for the greater protection and security of the public, and it was not competent to the Marquis of Hertford to reserve to himself a power of disposing of his property by a will or codicil executed in any other manner than required by this section of the act. The power of a testator under the present act cannot be considered greater than that of a deviser under the Statute of Frauds; the argument applies in the same manner to him, and the same consequence follows. As Mr Justice Wilson says: "This does not leave it at the option of the testator, but is a positive provision that a will shall be void if not executed according to the statute; and the testator cannot say, he will make a will without the requisites prescribed, either p-

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thinking he will be imposed upon, or not caring about it. The law will not suffer that, but requires in all cases that these ceremonies, which might be considered as circumstance only, if the act had not said otherwise, shall be essential and be observed in making every will. Therefore, this cannot be supported as a testamentary paper on that principle. I believe it is true, and I have found no case to the contrary, that if a testator in his will refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper makes part of the will, whether executed or not." And that is the rule of law, where a paper is so expressly referred to, and so described, that there can be doubt of its identity, and the will, which so refers to such paper, is executed in the presence of witnesses, that paper forms part of the will whether executed or not; and such reference is the same as if he had incorporated it. And therefore if the Marquis of Hertford had so described any previous papers, and stated that they were intended to form part of his will, the Court would have held them to be as much a part of his will as if incorporated in the will itself, and would have given effect to all these three codicils, if so identified, as a good disposition of property, as well as to the other papers. But the object here is to give effect to papers not in existence at the time; —the papers were *in futuro*, —the codicils were to be written.

The result of Mr. Justice Wilson's opinion was, that the paper not forming a part of the will of the testator, and not being incorporated and not being

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in existence at the time when the deceased wrote the will, and not being executed in conformity to the Statute of Frauds, had no operation upon the freehold estate, and, therefore, it was immaterial whether it was considered as a deed or as a will; because as a deed it was void, the limitations being too remote; and as a will it was void, not being properly executed. The next consideration was, what effect the paper could have upon the copyhold estate; and as the copyhold had been surrendered to the use of the will, and in such a case a man may by any testamentary paper not executed in the presence of three witnesses direct the uses, this paper being considered testamentary was sufficient to dispose of the copyhold estates.

Mr. Justice Buller was of the same opinion as to the effect of the deed, as affecting the freehold property: he concurred in opinion with Mr. Justice Wilson, that the deed, not being executed according to the statute, not being in existence at the time the will was executed, and therefore not being expressly referred to, could not form part of the will.

The Lord Chancellor then gives his opinion upon the subject, and it may not be improper to consider part of his judgment. He was of opinion that, taking the second instrument as a deed, the opinion of the Court of King's Bench on the case submitted to them was well founded. He says, "That led me to look farther into the case, for it was set down for further directions, and I was to proceed, upon the certificate, to the sequel of the cause, containing no difficulty whatever; therefore I thought it necessary to have it more fully argued. It has been argued with great industry and ability. Concurring

entirely with my lords, the judges, nothing remains but to state shortly the precise points upon which my opinion takes the same direction. I am of opinion, that upon the will there is clearly a resulting trust for the heir, so far as there is no disposition of the beneficial interest. That was the first question made." Then the Chancellor proceeds to the second point. "Secondly, that the last instrument, though called a deed, though in the form of a deed, is testamentary; that it is dependent upon the will, and will have all the effects that a testamentary act so executed can by law have. Thirdly, that there is no difference between law and equity in determining upon the effect of a testamentary act, and this instrument cannot pass the freehold contrary to the provisions of a public law making that act void." The distinction has been very fully stated between a will duly executed, which is a competent disposition by reference to a prior instrument, and a will which is an imperfect disposition by reserving a part, the reserved part to be afterwards disposed of by a future instrument. It was argued that the determinations in this Court had established a more favourable construction as to informal codicils, and that argument referred to cases in which the Court held that legacies given by an informal instrument would attach upon real estate charged by a will properly executed; and *Hyde v. Hyde*, *Masters v. Masters*, *Brudenell v. Boughton*, and *Lord Inchiquin v. O'Brien*, were quoted. *Hyde v. Hyde* is more remarkable for the doctrine and language it contains than for the decision, because it was unnecessary for the Court distinctly to decide the question, for the assets were marshalled; and therefore the question,

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whether the legacies in the second will should be charged on the real estate, did not arise. In *Masters v. Masters*, 1718, Sir Joseph Jekyll distinctly says, that legacies being charged upon land, those given by an unattested codicil are included. In *Brudenell v. Boughton*, Lord Hardwicke adopts that opinion, and reasons upon it, though it is true it was not necessary there to determine it. But in *Lord Inchiquin v. O'Brien* it was necessary; and *Brudenell v. Boughton* was adopted as the ground of the decision, and the Chancellor refers to his opinion in that case. These cases are said, and some inaccuracies in the Reports have led to that, to have gone upon this proposition. It is supposed to be Sir Joseph Jekyll's opinion, in *Masters v. Masters*, that it may be supported as a power reserved to the testator to increase the charge by a future act. That cannot be the ground of his opinion; there is a manifest incongruity in the supposition of a power reserved by a man's own will which cannot begin to operate till all power in him ceases. Now, according to the decision in *Masters v. Masters*, Sir Joseph Jekyll said, that "legacies being charged upon land, those given by an unattested codicil are included;"—it will be necessary presently to consider to what extent that doctrine goes. Then he comes to the observation of Mr. Justice Wilson, that the law is for the protection of the public. "The observation made by Mr. Justice Wilson is unanswerable: that it is not a personal privilege; that no man can reserve a power to act against the forms the law has imposed. Therefore, if it is to pass by a testamentary act, that must have all the requisite solemnities the law has directed."

Therefore he agreed with him entirely as to the law, that in order to give effect to a testamentary paper informally executed, as part of a regularly executed instrument, there must be a clear and distinct reference to the paper as being then in existence. He agrees, that a testator cannot reserve to himself a power to act against the law; and he refers in his judgment to cases (many of which were cited in the present argument), *Brudenell v. Boughton*, *Lord Inchiquin v. O'Brien*, with several others which are in affirmation of the doctrine; and, therefore, it was important to consider this case with reference to the question before the Court, and it follows, from this construction of the law, that if a testator expressly refers to a paper already written, and there can be no doubt or difficulty as to its identity, and the will which refers to it is executed in the presence of three witnesses, the paper referred to forms a part of the will, whether that paper be executed or not: I am ready to subscribe to the doctrine so laid down; but it must be an *existing* paper. According to the decision, a testator cannot reserve to himself a power of disposing of real estate by a paper not in existence at the time; and he cannot reserve to himself the power of disposing of his property contrary to law. The effect of the decision in *Haberg- ham v. Vincent*, and of many other cases cited in the Report, confirms this doctrine, (which also shows the limitation with which the rule was adopted,) that the paper must be an existing paper at the time the will was made. There are several other cases and authorities cited as to the limitation of the rule; and in the case of *Smart v. Prujean* (6 Vesey, 565), reference was made to the case of *Haberg- ham v.*

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1843. *Vincent*, as deciding that under a charge of legacies upon land, legacies given by a subsequent unattested codicil would be charged, and there is no doubt of this. In the case of *Smart v. Prujean*, Lord Eldon said, "I am very strongly of opinion, thinking these two legacies would be good, if the fund was well given, that there is not sufficient legal certainty to be collected from the instrument signed by three witnesses, that the testator has disposed of his real estate;"—that is, by a will executed according to the Statute of Frauds, as it was done by a private letter of instructions. The testator in that case executed a will, duly attested, whereby he devised his real estates upon trust for such purposes as he should by a private letter or paper of instruction which he intended to leave with Mrs. Johnson, the superior of an English convent at Gravelines, direct or appoint. After his death, in his bureau, in the room in which he had resided, belonging to an adjoining the Monastery of English Nuns at Gravelines, of which Clementina Johnson was superior, two paper writings were found in the same envelope with the will, which envelope was sealed up and indorsed in the hand of the testator, "The will of Anthony Lowe." The object of the letters is not material; the letter addressed to the abbess or superior of the English monastery at Gravelines, enters into details as to the mode in which the property shall be disposed of. It was contended, that these papers did not form part of his testamentary disposition, and that the parties to whom the legacies were bequeathed had no right to recover them. The Lord Chancellor said, "I am strongly of opinion, thinking these two legacies would be good

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if the fund was well given, that there is not sufficient legal certainty to be collected from the instrument signed by three witnesses that the testator has disposed of his real estate. The rule goes no further than this, (I except charges for debts and legacies,) that if the produce of real estate is to be disposed of, you must show an instrument in effect executed by the testator in the presence of three witnesses, and evidencing from its own contents that it is so in a sense, even if no attestation is annexed to it. The rule of law is, that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court can be under no mistake." That is in reference to what had been decided in *Habergham v. Vincent*, that the papers must be described "so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court can be under no mistake." And he proceeds to consider the circumstances of the case I have observed, that the testator at his death resided in the convent, or near the convent, of which Mrs. Johnson was the superior, and that the papers were found sealed up in an envelope with the will. The learned judge then proceeds to express himself thus: "Judging as a private individual, there can be no doubt that when he executed the will he meant that instrument and those two letters should have their effect; but unless the rule of law allows me, I cannot establish the letters, and I am not satisfied he meant them to have their effect unless delivered to the superior, as he might mean that to be a part of the act to make the will com-

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1843. plete. The intention of leaving them with her can never, under the circumstances in which he lived, be satisfied by the circumstance of finding them in the convent. He was living, and had his bureau in that room belonging to the convent, and it is impossible upon that circumstance to say that according to his intention he had left them with her. From his residence he could not avoid leaving them there. This is fortified by what follows. Mrs Johnson lived some time, and he never left any paper with her, or delivered any to her successor. Certainly, at his death, the abbess had no notion they were left with her; for she desires the will to be brought to her, and gets possession of it. In favour of an heir-at-law, whom I must see disinherited by nothing but a clear manifestation of intention, it would not be too strong to say the testator did not mean his will to be consummate unless he should do that act of leaving it with the superior which he never did. But there is another ground not whether the same envelope or superscription evidence that the testator meant these should be the papers referred to; but whether I must of necessity collect from the contents of the will that they should be considered the same. The same cover is nothing with reference to the statute, and the superscription has not three witnesses. The true question is if these papers were found in the bureau with the will, can I say from the contents of the will that the two papers are the papers referred to? Suppose several other papers were found with them, could I say this will would have enabled me to select the two as the only papers referred to? The rule as in my opinion are, that the will has not, by its con-

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ten^{ts}, sufficiently identified these papers to enable
me to say they are necessarily incorporated; if not,
th^{ey} are not attested by three witnesses, and it is
admitted on all hands that this sort of disposition,
un^{less} the antecedent paper is incorporated, cannot
be brought within the rule as to debts and legacies
ch^{arged} on real estate by an unattested paper. I
cannot, therefore, give these parties their legacies,
th^{ough} I regret it." To be sure, a stronger case
in its circumstances could not well be, leading
al^{most} to a presumption that these papers, found
se^{aled} up in an envelope with the will, should be
co^{nsidered} as part of the will. The Lord Chancellor
re^{gretted} that he could not give the parties their
le^{gacies}; as a private individual, he had no doubt
th^{at} the testator, when he executed his will, meant
th^{at} these two papers should have effect; but they
w^{ere} not necessarily incorporated with or made part
of his will, and being unattested they consequently
ha^d no effect as a disposition of real property.

I have cited more of these cases than might be
ot^{herwise} requisite, in order to save the necessity of
ad^{verting} to them afterwards; and I think they
clearly show that, as Lord Eldon says, to bring
an unattested paper within the rule as to legacies
ch^{arged} on real estate by such papers, it must be
clearly identified and incorporated in the will.

Now with respect to the extent to which real pro-
perty may be charged with legacies by an unattested
paper, nothing can be more clear to show the prin-
ciple than what is laid down by Sir William Grant,
in *Rose v. Cunynghame* (a). In that case, the ques-
tion was whether the real estate should be charged

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(a) 12 Ves. 29.

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with all the legacies bequeathed by an instrument to be executed by the testator. The Master of the Rolls said, "This case is materially different from any that have been hitherto decided; for the charge is of a very peculiar nature, not of all legacies he shall afterwards give, but of all such legacies as he shall afterwards charge upon the estate, or make payable out of it." Now if the real estate and the personal estate had been charged with the legacies, the general legacies, to be given by him, one as a primary fund, the other to assist, then the charge upon the real estate would have been a good charge but as it was only to remain liable to the charge such legacies as he should afterwards charge on the estate or may make payable out of it, the Master of the Rolls was of opinion that it could not be a charge on the land, and he expresses himself in the following words: "Suppose he had given a general legacy by his will, that would not be charged upon the estate, nor a general legacy by a codicil. For the purpose the legatee must show, that the legacy was made chargeable upon, or payable out of the real estate. That seems in effect a reservation, by a will duly executed, of a power to charge the real estate by a will not duly attested. When a man by a will duly executed charges all legacies generally, expressing his resolution, that whenever he gives them they shall be a charge, it is determined, that whenever given they shall be a charge. But according to this, it is not in the duly attested will alone that you find the charge, but the intention to make it a charge may be in the unattested instrument, the codicil." Therefore he reasons in this way: "This is only an attempt to reserve by a will duly ex-

ed a power to charge by a will not duly executed. the case of *Habergham v. Vincent*. It might well have been contended in that instance that : was an adoption into the will of that future ment; but the opinion of the Lord Chancellor he Judges was, that it was not competent to a to give himself such a power, viz. a power to se of land by an unattested instrument. That e reservation this testator attempts to make; less he thinks fit, when he makes his codicil, clare his intention that his land shall be charged the legacy or annuity, it shall not be charged." at the distinction between these cases is this: where landed property is charged by a will executed for the general payment of debts and ies, then the moment it is shown that there is t or legacy, in whatever instrument the legacy be given, the charge attaches upon the land. why? not by virtue of the unattested instru- , but by virtue of the duly attested instrument hich the land had been charged. That is the principle on which the cases have all along ed,—that you may incorporate an un- ted paper into a will that is duly executed by a iently clear and distinct reference to it with re- to which there can be no mistake; and that when ave once charged legacies on land by a will executed, that being a general charge created e will itself, you render the land subject to the ent of legacies, given by whatever form of ument they may be given; the legacy is given e instrument which gives that legacy, but the e on the estate is made by the executed will. ow the same doctrine is adopted and the same

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argument is employed, as to the reservation of power, in the case of *Hooper v. Goodwin* (a), and in several other cases, in which the Master of the Rolls decided that the line has always been drawn between legacies charged upon the land, as an auxiliary fund, and a portion of the land itself, and the produce of the land when directed to be sold. He says, "The principle of these cases may be disputable;" that is, where legacies are in themselves liable to the same considerations as debts. It was uncertain what a man might owe at his death; and having charged his estates with his debts, it was thought that, that being a fund so fluctuating itself, it was necessary to pay debts contracted after notwithstanding the Statute of Frauds. So considering that it was uncertain what legacies might be given at the time of his death, they were considered on the same principle as debts contracted after the date of the will, and were considered to be charged by the will, that charge on the land having been created by a duly executed instrument, and he says "The principle may perhaps be disputable; but the judges by whom they were decided, did expressly declare, that with regard to a charge upon land only, and by consequence to the produce of it, the devise cannot be made or altered but by a will executed according to the statute."

All these cases go on the principle that, in order to effect a charge on land by an unexecuted instrument, the charge must be made by a legally executed will; and consequently, as the same principle is to be applied now to a will of personalty, as for

(a) 18 Ves. 156.

merly to a will of real property, the charge must be by a paper executed according to law, and no prospective power can be given to a testator to dispose of his personal property by any other will or codicil than one executed according to the provisions of the statute now in force.

Such being the effect of the cases with respect to the manner in which property can be disposed of, as the law at present stands, and being of opinion that the reservation of such power is not legal, that no man can legally claim it, the next question to be considered is, as to the confirmation of these papers by the codicil of November, 1839, which applies to two of these codicils, but not as to the third, for that is not confirmed by that codicil.

Now the question upon this part of the case depends very much upon the effect which is to be attributed to the codicil of the 26th April, 1839. [The Court read it *ante*, p. 470. Paper (C).] The question is whether this ratification and confirmation of the "said will and codicils" is sufficient to give effect to the two other codicils, they not being entitled to probate as they stand by themselves, without a confirmation of them?

This is undoubtedly a very important point in respect to questions which are continually arising in this Court, and with respect to which at present there has been no decision given in Courts of Common Law upon the construction of the statute. I may here at once dispose of a part of the argument as to the application of the statute to codicils to a will of a date antecedent to the time the statute was to come into operation; for it is declared in one of the sections, that the act should not apply to wills

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1843. executed before 1st January, 1838. It was argued that the will in this case having been executed previously to the 1st January, 1838, the codicils also must be supposed to have the same date themselves as the date of the will ; that therefore, it was not necessary that they should be executed according to the provisions of the statute. But I am clearly of opinion that that is not the true construction of the statute. The construction which the Court has put upon that section of the act of Parliament is this, that wills executed between the date of the passing of the act and the day on which it came into operation, would not require to be attested the presence of two witnesses ; that they would be valid, notwithstanding they should merely be signed by the deceased, as far as personal property is concerned ; but that, if any alteration was made in these wills after that date, then that alteration must be authenticated in the manner required by the act ; for instance, an obliteration made after 1st January, 1838, could only be effectual where it was authenticated by the subscription of the testator and of two witnesses, in the manner directed by the act ; alterations must, in like manner, be attested by two witnesses, and that decision has been upheld by the Judicial Committee of the Privy Council in the case of *Brooke v. Kent*. There a will had been executed by the deceased with a certain amount of charge on real property, and there had been an alteration or obliteration, and the obliteration was so complete that it could not be made out, and the question before this Court was, whether it could receive evidence *dehors* the will, in order to show what the obliterated words had been, and this Court was of

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Opinion that it could not receive such evidence, notwithstanding there was upon the outside sheet of the will a writing in the testator's own hand, declaring what the words obliterated were. It will be recollected that the act of Parliament declares that no obliteration or alteration in a will shall have any effect unless executed as a will. The Judicial Committee were of a different opinion; they held that evidence might be received; but they also held that the act of Parliament did apply to alterations made subsequently to 1838, in a will executed prior to that date. If it applies to an alteration made in such a will, *a fortiori*, it applies to additions made to that will by a codicil or paper, subsequently to 1838. I am clearly of opinion that the act of Parliament does apply, and that no codicil executed after the 1st of January, 1838, can be valid, unless it is executed according to the provisions of the statute.

But the question is, whether this codicil which is so executed, can give effect to these informal instruments. Now this part of the case in some measure depends on the principle in *Habergham v. Vincent*, and other cases cited in argument, *Smart v. Prujans*, and *Dillon v. Harris* (a), which last case is much of the same description, where papers failed for want of a sufficient identification. I say that much depends upon the principle which was laid down and acted upon in those cases. These are imperfect instruments; they are invalid as codicils, consequently they are not codicils, and they can *per se* have no effect or operation. If they are to have effect and operation, it must be by a codicil

(a) 4 Bligh. N. S. 321.

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which ratifies and confirms all former wills and codicils. Then comes a very important question, whether these unexecuted papers are to be considered as codicils or not, and as confirmed and ratified by this instrument, and are to have effect in consequence of it. Here is the great difficulty, and the great point of the case. There is no doubt whatever, and it is not necessary to refer to authorities for that purpose, that all codicils are parts of a will, and that a codicil referring to a will and professing to republish a will, will also be a republication of the codicils attached to that will, and numerous cases have been cited, and strong cases, to show the manner in which that doctrine has been applied; and I entirely assent to the doctrine, that if a will is republished, the codicils attached to that will are also republished. It has been held in a variety of cases, with respect to the construction of wills and their operation upon real property, that an unexecuted codicil may, by a properly attested instrument be rendered valid and effectual by republication. The case of *Utterton v. Robins* (a), which was referred to in argument, is a strong case to show that a codicil referring to an unexecuted paper, without even referring to it, provided it is written on the same sheet of paper, would give effect to that codicil, though of itself it was not executed, so as to pass real estate. But the great question here is, whether to the description given of the instruments, whether they are meant and intended to be revived by the deceased Marquis and made effectual, and whether if he so meant and intended to revive them, it was possible he should give them that effect.

(a) 1 Ad. & Ellis, 423.

Now from the cases referred to in argument, as bearing upon the subject, it is clear that where codicils have been written on the same sheet of paper with the will, the execution of these codicils is held to have been a sufficient republication of them, there being an internal annexation, with respect to which there was no doubt whatever. The case of *De Bathe v. Lord Fingal* (a), was the case of an appointment of a guardian to children by a will having only one witness, whereas by the statute 12 Car. 2, c. 54, in order to render valid a testamentary appointment of guardians, two witnesses are required; it was held, however, that though the will was imperfectly attested, it was rendered perfect by a codicil duly attested, by its being declared to be a codicil to a will "hereunto annexed," on the same sheet of paper, the Master of the Rolls holding that it amounted to a re-execution and republication. Therefore, there was a reference to an instrument being on the same sheet of paper to which it referred; again, in another case cited in argument, *Doe dem. Williams v. Evans* (b) the will, purporting to dispose of freehold property, was neither signed nor attested, but reference was made in a codicil to the "foregoing will." "I make a codicil to the foregoing will." It was held that the attestation extended to all; and Mr. Baron Bayley said, that if the codicil had not referred to the will, he should have thought that it did not set up the instrument. But in the case of *Gordon v. Reay* (c), the Vice-Chancellor was of opinion that a second

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(a) 16 Ves. 167.

(b) 1 Cromp. & Mees. 42.

(c) 5 Sim. 274.

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codicil, duly attested, which recited a will which was also duly attested by date which expressly confirmed all provisions and bequests in favour of a particular individual amounted to a republication of the first codicil unattested charging freehold lands. Therefore there can be no doubt, that if this paper had been written on the same sheet, and had referred to these codicils, or any of them, that it would have been a good republication, and have given effect to them; that the attestation might with propriety have been applied to them. It was held by this Court, upon motion, in the case of *The Goods of Smith (a)*, where the attested codicil was upon the same sheet of paper with a previous unattested codicil, that it was sufficient to give effect to that codicil. But here the great difficulty arises from the description given by this paper. Is it clearly manifested upon the face of this paper that it was the intention of the testator to give effect to these unexecuted codicils by the general description "codicils?" If not, does not the case fall within the rule laid down by Lord Eldon in *Smart v. Prujean*, that he cannot conjecture, that it must be so plain and manifest that there can be no mistake? The Court is not at liberty to indulge in conjecture. He says, "Judging as a private individual, there can be no doubt, that when he executed the will, he meant that that instrument and those two letters should have effect; but, unless the rule of law allows me, I cannot establish the 'letters.'" He was of opinion that the rule of law did not warrant him, and he decided that there was a failure of

(a) 2 Curt. 796.

Proof of identity. So in *Dillon v. Harris*, and other cases referred to in the argument.

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Now how stands the case? I may feel strongly that it was the intention of Lord Hertford that the papers should have effect, notwithstanding they were not executed according to law; but I have great doubts and great difficulty in coming to the conclusion that he does by the description of "codicils" legally express that intention, so as to leave no doubt upon the mind of the Court. The difficulty arises upon these points: there are two sets of instruments to which the description may apply. It is contended that it may apply to the unattested instruments, because the testator describes them as codicils. It is clear that the description may apply to another class of papers, namely, those duly executed; because they are codicils, they are codicils of the will: and, although it was strongly urged that there was no necessity for the ratification and confirmation of an instrument duly executed according to the law, as it stood, and therefore the Court must attribute this ratification and confirmation to the codicils, which, without such ratification and confirmation, would have no effect; yet I think the force of that argument is met by the observation, that there were other codicils; that this codicil confirmed and ratified what he had before done, before it became necessary to confirm and ratify them—when these codicils which were executed according to the law as it then stood, were entitled to have effect. What is done in this class of cases? Lord Eldon, in *Smart v. Prujean*, said, "Suppose, there were other papers, could I select some as the papers referred to? I may conjecture, but the fact must

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A good deal has been said in reference to the construction to be given to technical words, and the use which is supposed to have been made of them by the testator, and many cases were adverted to, into which it is not necessary for the Court to enter particularly, to show that *prima facie* the construction to be given to technical words must be that which they bear in their technical sense; that, where it appeared from the context that it was not the intention of the testator to use them in that sense, then the more popular sense might be given to them. And amongst other cases was cited that of *Wilkinson v. Adam* (a). That case was cited for another purpose in the argument, —for the purpose of showing the necessity of a distinct reference to a paper intended to be incorporated with an attested instrument. But upon a part of the case, a question arose with respect to the description of "children," in the will of the testator; Lord Eldon expressed himself in these words, (p. 462): "The rule cannot be stated too broadly,

(a) 1 Ves. & B. 422. 445. 462.

that the description, 'child,' 'son,' 'issue,' every word of that species, must be taken *primæ facie* to mean 'legitimate child, son, or issue;' but the true question here is, whether it appears, by what we call sufficient description, or necessary implication, that the testator did mean these illegitimate children." And in that case it was the opinion of Lord Eldon, that the term "children" meant the illegitimate children of the testator. Now the question had been before him previously, and he requested the assistance of three of the Common Law Judges, who gave their opinion in writing, upon the interpretation and construction of the will upon the word "children," which is used there; as to who were intended by that term; and the Common Law Judges seem to have been of opinion, coinciding with his Lordship in the general interpretation, that illegitimate children were intended; yet they seem to intimate an opinion that legitimate and illegitimate children might be included under the same description of "children," and take shares together. Lord Eldon thus expresses himself: "It was further agued with great force, that if the testator had lived until the death of his wife, as he did, and had afterwards married Ann Lewis, and had legitimate children by her, those children must have taken; and legitimate and illegitimate children cannot both take under the same description; and it would be very difficult to persuade me that they can." Lord Eldon, therefore, expresses strongly his opinion, that it would be very difficult to persuade him that legitimate and illegitimate children could take under the same description of "children." He expresses his difference of opinion from the Common Law Judges, by

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are not entitled to the probate of the Court; they are not executed according to the provisions of the act of parliament; and the subsequent ratification by a regularly executed instrument is not sufficient to give them effect and operation. With respect to the paper of May, 1840, there is no ratification of that; the codicil ratifying and confirming the will and codicils is dated in April, 1839, and consequently it could have no prospective operation on the codicils executed afterwards; and the course I take, is to reject these two allegations.

I reject the allegations and decree the expenses to be paid out of the estate. I should be much better pleased, and it would be more satisfactory to my mind, that the case should be decided by appeal. I should then have some sure ground on which I can proceed in other cases.

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Construction of the 11th section of the 1 Vict. c. 26, which enacts, "That any soldier, being in actual military service, may dispose of his personal estate as he might have done, before the making of the act."

MAJOR-GENERAL DRUMMOND died at Woolwich on the 1st of January, 1843. At the time of his decease he was an officer, holding a commission in Her Majesty's army, filling the office of Director-General of the royal artillery, and was on full-pay. A testamentary paper was found locked up in a private repository of the deceased; it was dated the 26th of June, 1842, it was signed by the deceased and had a seal opposite to the signature; it was attested by witnesses.

This paper was propounded as the last will and testament of the deceased; the allegation propounded by the paper pleaded,

4th Article.—That the 11th section of the 1 Vict. c. 26, provides, “That any soldier, being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act.”—5th Article. That the deceased party, at the date of his will, and at the time of his death, was a major-general in Her Majesty’s army, on full-pay, and held the appointment of Director-General of the royal artillery, and received the full-pay and allowances of such appointment. That the duties of his office extended to the troops of the royal artillery, abroad, as well as in England; that he was liable to be tried by court-martial, and was subject in all respects to military law; that he was, accordingly, liable to be sent abroad upon foreign service, whenever it might be required; and was as completely, to all intents and purposes, in the actual service of Her Majesty, as if he had been in the command of, or serving with a British regiment on foreign service.

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The admission of this allegation was opposed on behalf of the next of kin of the deceased, by

The Queen’s Advocate,

This will does not come within the exceptive section of the Wills Act. The exception only applies to a soldier in actual warfare, or so circumstanced that he cannot comply with the requisite solemnities, prescribed by the 9th section; as for instance, on a station, where he cannot obtain legal advice and assistance. The Legislature did not intend to favour the soldier more than the seaman, and the words “actual military” were used in the

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same limited sense, with respect to a soldier, as the words "at sea," in the case of a seaman. A seaman on board a guard-ship, moored in harbour, is not "at sea" within the meaning of the act, *Lord Hugh Seymour's case* (a), yet he may fairly be said to be as much at sea, as General Drummond, living at Woolwich, can be said to be "in actual military service." If it was intended to confer this privilege on all soldiers, without reference to circumstances, the Legislature would have said "any soldier in His Majesty's service." If any limit is to be imposed on the exception, its extent must be sought for in the civil law, from whence the exception was borrowed. *The Digest*, lib. 29, tit. 1; *The Code*, lib. 6, tit. 1; *The Institutes*, lib. 2, tit. 11; Domat. Civil Law, vol. 2, lib. 3, s. 15; *Justinian* (Dr. Harris's edition); *Godolphin*, cap. 5. p. 16.

Twiss, (same side) cited, *Swinburne*, part 1, c. 14; *Huber's Præl. Jur. Civ.* lib. 2, tit. 11; *J. Voet*, lib. 29, tit. 1; *P. Voet*, lib. 2, tit. 11; *Mysinger*, lib. 2, tit. 11; *Durandus*, lib. 2, part 2; *Hostiensis*, lib. 3, tit. 26; *Gail*, lib. 2, Obs. 113; *Donellus*, tit. 21; *Viglius*, tit. 10; *Puffendorf*, Obs. 187, s. 3; *Burge on Colonial Law*, vol. 4, p. 394; *Code Civil*, lib. 3, tit. 2, s. 2; *Pothier on Treaties*, vol. 5, tit. 16; *Code Civil of Sardinia*, lib. 3, tit. 2; *Code of The Two Sicilies*, c. 5, s. 11. By the law of Spain, the testaments of soldiers who are in actual service, "*en guerra actual*," do not require the solemnity which is enjoined for other testaments. In 1512, Maximilian I., in the *Ordinatio Notoriatum*, issued at the diet of Cologne, ordained, that the word "*expeditio*" should be confined to "*milites in acie seu*

(a) 2 Curt. 339.

conflictu constituti." The *Corpus Juris Frederici*, part 2, lib. 7, tit. 2, thus states the law of Prussia,—
 "The privilege of military testaments shall be limited to the soldiers in the field of battle, in a besieged town, on a march, in a frontier garrison, and when wounded or sick." In Mecklenburgh and Westphalia the law is the same as that of Prussia. In Bavaria the law follows strictly the ordinance of Maximilian. Holland observes the rules of the Civil Law.

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Haggard, in support of the allegation.

The proper and intelligible distinction between a soldier in actual military service and a soldier not so, is, a soldier on full-pay, or on half-pay. A soldier, on half-pay, is still liable to be called upon to serve his country, but he is not in actual military service. Foreign codes and laws cannot furnish a rule, whereby to construe an act of Parliament, applying to the British army; *non constat*, that the regulations of any foreign armies are similar to those of the British. With regard to the meaning of the word "*expeditio*" the commentators differ. *Cujacius Consult.* 49, says, "*Testamentum valere jure militari, etiamsi non fiat in procinctu, modo fiat in expeditione, in castris, in statiois.*" Therefore, according to this commentator, the exception was extended to a soldier in garrison: this is strictly the case with General Drummond; Woolwich is a garrison, the gates are closed at night, and General Drummond could not be absent without leave. He also cited *Re Phipps* (a), *Re Hayes* (b), *Morrell v. Morrell* (c), *Re Ley* (d), *Re Donaldson* (e).

(a) 2 Curt. 338.

(b) 2 Curt. 368.

(c) 1 Hagg. 51.

(d) 2 Curt. 75.

(e) 2 Curt. 368.

1843. *Pratt*, (same side.)—The distinction, between
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 DRUMMOND nised among military authorities, and supplies the true
 against interpretation of the words "in actual military ser-
 PARISH. vice." In the case of *Bowler v. Owen* (a), a question
 arose, whether an out-pensioner of Chelsea College
 was entitled to the benefit of a clause in the Mutiny
 Act, whereby a soldier in Her Majesty's service was
 not liable to be arrested, unless he owed a sum of
 money to a certain amount. It was there contended,
 that a man who has once been in the army does not
 lose his military character by being placed on half-pay
 but the Court held he was not entitled to the privi-
 lege, being under no military discipline. In *Brad-
 ley v. Arthur* (b), Justice Bayley takes a distinction
 between *employed* and *unemployed* officers, and gave
 it as his opinion, that employed officers in pay,
 although uncommissioned, came within the Mutiny
 Act. To the same effect is *M'Arthur on Courts-
 Martial*, p. 190—198.

JUDGMENT.

SIR HERBERT JENNER FUST.

May 19th. This question relates to a paper which is pro-
 pounded as the last will and testament of Major-
 General Drummond, who died in the month of
 January, in the present year. The paper is all in
 the handwriting of the deceased; it is dated the
 26th of June, 1842, signed by him, and sealed, but
 it is not attested by witnesses, so that, under the
 general provisions of the 26th cap. of 1 Vict. this
 paper is not entitled to probate;—I say the general
 provisions of the act, because the paper is pro-

(a) Barnes's Notes, 432.
 6 Dow. & Ryl. 421.

(b) 4 B. & Cres. 308 &

unded as a good and valid disposition of property, as coming under the exception of the 11th section of the act, which enacts, "That any soldier, being in *actual military service*, or any mariner or man, being at sea, may dispose of his personal estate as he might have done before the passing of the act." Now it was contended, when the admissibility of this allegation was debated, that this privilege extended to soldiers of all degrees, and under any circumstances, with this exception, that there might be a distinction between soldiers on full-pay, and on half-pay, but that otherwise all soldiers belonging to the British army are to be considered as being on actual military service. Assuming this to be the construction of the act of Parliament, the effect would be to give to every soldier on full-pay, from the recruit of to-day to the most general in the service, a disposition over his personal property, not only by a writing unattested by witnesses, but by a will made by word of mouth. The exceptive clause, in the present Wills Act, is the same as that in the Statute of Frauds, by which last act it became, for the first time, necessary that all dispositions of personal property should be in writing; therefore, as I have said, it would give to all soldiers, on full-pay, taking that to be the interpretation of the words, "*actual military service*," the power of disposing of property in any manner, as they might have done previously to the act passing; and consequently, as before the act of Charles 2, a will, made by word of mouth, would have been as operative as a will executed in the most formal manner, the effect of this clause would be, to give, at the present day, validity to the most informal will.

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This is indeed a most startling proposition ; it seems hardly possible that it should be the intention of the Legislature to except out of the present Will Act so large a body of persons as the British army now consists of, or indeed as in the times of Charles the 2nd it was composed of. It is to be remembered that the exception was first made when the Statute of Frauds was passed (A. D. 1676), it must therefore be considered with reference to the circumstances of that time, for the 11th section of the present act is only a continuation of the privilege granted to soldiers and mariners in the time of Charles 2nd. Prior to the Statute of Frauds, a will might not only be made by word of mouth, but the most solemn will might be revoked by word of mouth. A will executed in the presence of witnesses might be revoked by parol. What would be the effect, what would be the state in which the whole of the British army would be placed, if this clause were now to have universal operation among that large body. In the present case the will is one which undoubtedly the Court would be most anxious to support, if it can ; it is a holograph, and therefore is not liable to the suspicion of being a forgery, as might be the case in respect to a will in which the signature only was in the handwriting of the deceased ; it is a will written with great care ; it was kept by the testator in his private repository ; there is no question that it is the act of the deceased ; the only question is, is it a will which can be carried into effect ? It also unfortunately happens, that if this holograph paper can be supported, the Court must include in such a determination papers less formal than this, wills by parol ; for it is only by shewing

that the exception extends to all classes of the army, and to all descriptions of testamentary disposition, that this paper can be supported. I much doubt whether if this privilege could be maintained it would be for the benefit of the army at large ; the effect of such a decision would be to open on the British soldier all the mischief which the Statute of Frauds and the present Wills Act intended to guard against ; such must be the case if the Court holds, that every soldier on full or half-pay may make a will by parol, or a will in writing without witnesses. The Court must look to the principle intended to be adopted into this act, as also into the Statute of Frauds. The words are, " no soldier being *in actual military service*," these words must have some meaning, it cannot be, that they would be added to the word " soldier " unless it were intended to impose some limitation as to the particular class of soldier to whom they were intended to apply ; if it were intended to comprise in the exceptive clause all classes and grades of persons in the service, there could be no necessity for the insertion of the words " actual military service." The Court must endeavour to see whether it cannot find some meaning for these words, and some reason for their insertion in the two Acts of Parliament.

In the very elaborate arguments addressed to the Court by the learned counsel on both sides, the Court has not been referred to any case where a judicial decision has been come to on this point, and, with the exception of a case to which the Court itself had referred, and to which it will presently advert, the Court is not aware of any case which has occurred with respect to the will of a soldier.

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The only decisions of which the Court is aware, are with respect to the corresponding part of the clause as to the wills of mariners or seamen, as to which some few cases have occurred, and I allude particularly to the case of *Lord Hugh Seymour* (a). That was a case in which the testator was Commander-in-Chief of the Naval force at Jamaica but lived on shore at the official residence, his family and establishment were on shore; in the case it was held that the testator did not come within the exceptive clause relating to mariners at sea; and consequently a nuncupative will made by him on shore was pronounced to be invalid, and the allegation propounding it was rejected. One or two other cases have occurred, in which that case has been referred to, but, with these exceptions, I am not aware that the discussion on this section of the act has gone further than a question on motion. The Court has in some few cases, where the point admitted of no doubt, acted on the certificate of the War Office. It has now become a matter of importance that this question should be solemnly determined as to the description of persons coming within the exception of the 11th section of the Will Act. It certainly would have been a matter of some surprise that so few cases should have occurred in which it has been necessary to consider the effect of this clause, if the fact were not accounted for by the reflection of how unsafe a thing it is to trust to will made by word of mouth when the mode of disposing of personal property, according to the law of England, is so simple, and requires so few solemnities; and when, as is quite manifest, a will by word of mouth may lead to fraud, or misapprehension

(a) 2 Curt. 339.

consequently, most persons, even military testators, would prefer making their wills in writing instead of trusting to so unsafe a mode of disposing of their property:—this consideration may, I think, fairly account for the paucity of cases of this description.

Now with regard to the construction to be put on these words of the 11th section, how is the meaning of them to be ascertained? It was observed in argument—and as a general proposition it is undoubtedly true,—that in construing a British Act of Parliament very little assistance can be derived from ancient or modern codes of other countries, but yet cases have occurred, and do occur in Courts of Law, where in interpreting an Act of Parliament, the context of which does not furnish the necessary information or precise meaning,—the assistance of foreign codes, from which the principle of that particular statute has been borrowed, has been resorted to, in order to give the true interpretation of the act. In this case it cannot be denied that the principle of this section was borrowed from the civil law,—indeed, that is not denied, it is admitted on all hands. It appears, from the preface to the life of Sir Leoline Jenkins, that he claimed to himself some merit for having, during the preparation of the Statute of Frauds, obtained for the soldiers of the English army the full benefit of the testamentary privileges of the Roman army;—therefore I think it quite clear, that the principle of the exception was borrowed from the civil law; and that in order to ascertain the extent and meaning of the exception, the civil law may be fairly resorted to. It has become necessary to recur to this, because the Court was referred to a variety of writers on the

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text law, and to many passages from the learned commentators on the text law; and it is well known that very subtle distinctions are to be found in the writings of the commentators. I will not enter into a long discussion on the different points which the commentators have treated, or on the conflict of laws in this respect; I have, however, thought it necessary to look into the commentaries, to see to what extent, in respect to the "*testamentum militare*," they consider (at least to the extent of the text law), the strict testamentary law was dispensed with. As far as I can collect, the only distinction upon which they differ is, whether the privilege extended to soldiers in quarters or in garrison "*in stativis aut in hybernis*." They all agree in this one particular, namely, that it was not every soldier, under every circumstance, who was entitled to this privilege, but that it was confined to those who were "*expeditionibus occupati*;" the only difference seeming to be what constituted *expeditio*, whether a soldier *profectus* was to be considered *in expeditione* until he actually returned home, or whether the expedition was at an end when he went into garrison or winter quarters. It is true that in its origin the testamentary privilege extended to all soldiers; we have it so expressed in the 29th Book of the Digest, entitled "*De testamento militis*," which begins by stating that full and free power of making a will was first granted by Julius Cæsar—"*Militibus liberam testamenti factionem primus quidam Julius Cæsar concessit*"—this, according to all the commentators, was the origin of the privilege of soldiers making wills without having a certain number of witnesses to attest them, and without the

observance of other solemnities, and that the privilege had no existence before the time of Julius Cæsar:—it goes on, “*sed ea concessio temporalis erat. Postea vero primus Titus dedit, post hoc Domitianus, postea Nerva plenissimam indulgentiam in milites contulit, eamque et Trajanus secutus est, et exinde mandatis inseri cepit caput tale: caput ex mandatis.*”—Having set forth with this in order to shew how far general the privilege was in its origin, the passage proceeds, “*Cum in notitiam meam prolatum est subinde testamenta a commilitonibus relicta proferri, quæ possint in controversiam deduci, si ad diligentiam legum revocentur et observantiam: secutus animi mei integritudinem erga optimos fidelissimosque commilitones simplicitati eorum consulendum existinavi, ut quoquo modo testati fuissent, rata esset eorum voluntas. Faciant igitur testamenta quo modo volent, quo modo poterint, sufficiatque ad bonorum suorum divisionem faciendam nuda voluntas testatoris.*” Nothing can be clearer than that this privilege in its origin extended to all ranks, and to the whole of the vast body of the Roman army; the interpretation in the glosses on the word “*simplicitas*” is, want of skill in legal forms, and the term made use of by Justinian in the Institutes (Lib. II. tit. xi.) is “*imperitia.*” In the gloss of Gothofred (Corp. Jur. Civ.) this is inserted, “*nisi domi sint tunc enim jure communi testari debent.*”

So stood the law at the time of the Digest: various limitations were afterwards imposed. In the 6th Book of the Code (tit. 21, law 3,) “*De testamento Militis*” is this passage, “*Quaquam militum testamenta juris vinculis non subjiciantur cum propter simplicitatem militarem*”—one observation in

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the gloss is, "*Simplicitas militaris ut hic armat militiæ,*" another is,—"*arma magis quam leges sciri miles præsumitur*"—the text goes on, "*quomodo velint et quomodo possint ea facere his concedatur tamen in Valeriani quondam centurionis testamenti institutio etiam jure communi concessit auctoritatem*— In law 17 of the same title, this is to be found, the heading of the law is, "*Quando miles testatur quomodo vult*"—"ne quidam putarent in omni temporibus licere militibus testamenta quomodo voluerint componere Sancimus his solis qui in expeditionibus occupati sunt." In the gloss, (Gothofred), is this passage, "*Idque sive sint in castris, sive in fossato, sive in hybernis, sive in præsiidiis, sive in stativis seu sedibus sedetis ac ædibus.*" Another gloss upon the word *expeditio* is, "*sufficit ergo ut fiat in expeditione licet non in procinctu.*" Reference has been made to Cujacius, (49th cap.) who says, "*cum autem quæritur an non aliter valeat testamentum jure militari quam si fiat in procinctu Respondeo etiam si non fiat in procinctu testamentum valere jure militari modo fiat in expeditione in castris in stativis.*" So that it was not, according to this commentator, absolutely necessary that the soldier should be in *procinctu*, that is, called out in preparation for battle, but the privilege existed when he was in *castris aut in stativis*, and the reason he assigns for this is, "*alioquin nihil distaret paganus a milite, nam et a pagano in procinctu in acie in hostico quoquo modo factum testamentum valet ratione pari.*" According to Cujacius, soldiers, in quarters or in camp, might make wills, without observing the solemnities of law; but he says, "*modo fiat in expeditione.*" Whether the privilege extended to all cases, when a soldier was

~~in~~ *castris aut in stativis*, might be a matter of some doubt, but it is not necessary to consider that question; it cannot be said that General Drummond was either in *castris*, or in *stativis*; then was he in *expeditione*? Now, Cujacius continues, "*Ergo qui in expeditione testatur miles in castris in fossato ut loquuntur, imo et qui in hybernis, ut meum judicium est, in stativis, in præsidis jure militari testamentum facere potest; ac proinde non est necesse ut adhibeat legitimum numerum testium ut est in principio tituli de militari testamento ubi et unum testem sufficere Theophilus noster scripsit. Et quidem nullum testem necessario requiro, ac satis esse opinor si aliis probationibus legitimis constare possit de voluntate militis.*" Here again Cujacius repeats the use of the word "*expeditio*;" he seems to think that a soldier in *castris*, or in *stativis*, is not required to observe the solemnities of the testamentary law, but still he is of opinion, that he must be in *expeditione*. Then arises the question,—what is the meaning of the word "*expeditio*?" According to Calvin, in his *Lexicon Juridicum*, it is this,—"*Expeditio proprie profectio cum expeditis militibus.*" "*Expediti milites vel in expeditionibus degentes dicuntur quicumque sint in ipso exercitu aut castris, id est eo loco quo reipublicæ causa est belli apparatus, seu in statione illi sint, seu in hybernis seu alicubi pro finibus imperii tuendis, imo quocunque loco sint militiæ causa, ut si Romæ sint ad defensionem urbis collocati et dispositi;*"—then it is argued from this,—"*Falsum ergo est stationarios et limenarchas non recte testaturos jure militari quia non sint in expeditionibus;*" then the authority of Ulpian is referred to, who says, (lib. 1, s. ult. de bon. poss. ex test.) "*Miles est etiamsi in nostro non est, et*

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Nauarchi ac trierarchi classium jure militari testari possunt, et in classibus omnes remiges ac nautæ milites sunt." So far, then, as Calvin is an authority, here is a definition of the word "*expeditio*." So far, then, as I have gone, it is quite clear, from these passages from the Digest, the Code, and the commentators, generally, that the privilege did not extend to soldiers of every description, they must be soldiers *expeditionibus occupati*, or called out to defend the city; this last case was of itself an exception, for it could not strictly be said to be "*expeditio*." I find the words of the Code thus limited in the 2d Book of the Institutes, (tit. 11), "*Supradicta diligens observatio in ordinandis testamentis militibus propter nimiam imperitiam eorum constitutionibus principalibus remissa est. Nam quævis in neque legitimum numerum testium adhibuerint neque aliam testamentorum solemnitatem observaverint recte nihilominus testantur, videlicet cum in expeditionibus occupati sunt: quod merito nostra constitutio introduxit.*" (The law referred to will be found in the Code, c. 6, tit. 21,) "*Quoquo enim modo voluntas ejus suprema inveniatur, sive scripta, sive sine scriptura, valet testamentum ex voluntate ejus. Illis autem temporibus per quæ citra expeditionum necessitatem in aliis locis vel suis ædibus degunt, minime ad vindicandum tale privilegium adjuvantur.*" It is quite clear, from this, that the privilege of deviating from the general law was confined to those soldiers who were "*expeditionibus occupati*," and that, if soldiers made wills at other times, they must comply with the requisites prescribed by the general Roman law, to give operation to a will. The same expressions are found in the same title and Book of the Institutes (sec. 3.)

" Sed hactenus hoc illis a principalibus constitutionibus conceditur quatenus militant et in castris degunt.

Post missionem vero veterani vel extra castra alii si faciant adhuc militantes testamentum, communi omnium civium Romanorum jure id facere debent."

The veterani here spoken of were not, as has been surmised, analogous to the generals of the English army, but soldiers who had served their time, and been discharged *propter honestam causam*,—but the important bearing of the passage is, that it shews that the privilege was confined simply and entirely to soldiers *expeditionibus occupati*. There is a passage from Vulteius (Lib. 2, c. 10), which sums up the whole of the law on this subject; the title is,

" De testamentis ordinandis." He says, "*Olim ante Justinianum hoc privilegium commune erat militibus omnibus sive in expeditione sive extra eam essent, sed Justinianus restrinxisse illud videtur ad milites eos qui in expeditione degerent. Non igitur existimandum est si testamentum est militis testamentum illud esse militare; nam sive jus quod ante Justinianum fuit, sive jus quod Justinianus postea introduxit spectes, multi sunt milites qui tamen non militant aut in expeditione degunt.* Nothing can be more clear than that, according to the Roman text-law, this was not a privilege extending to all soldiers, but to those only who were circumstanced as I have mentioned.

I now come to consider the case with reference to the passages cited from Swinburne, whom undoubtedly the Court will consider a very high authority; he speaks (Part 1, s. 13) of three sorts of privileged testaments, and first "*Testamentum militis.*" Of this he says (p. 95), "After we have

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viewed what privileges do belong to soldiers, it shall be expedient to shew what manner of soldiers they be to whom these privileges are granted ; 1st, *Milites armati*—2nd, *Milites literarii*—3rd, *Milites caelestes*.” He says, “ concerning the first, they be such as lie safely in some castle, or place of defence, or besieged by the enemy, only in readiness to be employed in case of invasion or rebellion, and then they do not enjoy these military privileges, or else they be such as are in *expedition* or *actual service of wars*, and such are privileged, at least during the time of their expedition, whether they be employed by land or by water, and whether they be horsemen or footmen.” Now the words used in both Acts of Parliaments are as nearly as possible the same as those used by Swinburne in explaining the word “ *expedition*,” the probability is, that the words of the 23rd section of the Statute of Frauds, from which the 11th section of the present act was taken, were borrowed from Swinburne. Mr. Burge in his work (vol. 4, p. 394), defines *actual military service* by the words “ *Qui in expeditionibus sunt.*” It has also been shewn in argument, that the codes of all countries in Europe seem to have limited the privilege in the same way ; the following writers, and laws have been cited, Donatus, Donellus, Paul and John Voet, Huber, Hostiensis, Gail, Viglius, Puffendorf, the Theodosian code, the French code. Pothier, who, in his sixth Book (tit. 16), says, “ Soldiers in forts or garrisons cannot avail themselves of this law.” The Sardinian code, the law of Spain, where the expression is “ *en guerra actual*,” the ordinance of the Emperor Maximilian in 1512 ; the law of Bavaria, of Mecklenburgh, of Westphalia,

—in short it appears that in all countries the privilege is accompanied with limitations; in most it would seem that a military will was only good when made on the field of battle, or marching against the enemy, and when made under these circumstances, it only remained good for three months after the soldier returned home, or arrived at a place where there was a consul, or some person before whom a will might be made.

These are the authorities to which the Court has thought it necessary to refer, in order to shew what was the principle of exempting the wills of soldiers from the stricter forms of testamentary law, and to shew that the privilege was borrowed from the Roman law, and engrafted into our laws, and that it is confined to soldiers placed in the particular situations I have described. The Court has also searched to find, if possible, any case in which a Court of law has put a construction on the words "actual military service;" the Court has found none, and therefore must resort to principle to put an interpretation on words to which some meaning must be given. The Court, at the commencement of this judgment, stated that there is one case in which the question has received, in this Court, a certain degree of interpretation; it is a case of *Shearman v. Pyke* (a). The following is the extract from Dr. Andrew's note: "James Wakeford was enlisted as a soldier in the service of the East India Company, and went with Governor Pyke to St. Helena, he was employed in his service as cook, and he gave him wages besides his pay. In 1719 the Governor left St. Helena to

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(a) Hil. Term, 1724.

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proceed to Bencoolen, but at Batavia they were informed that the factory at Bencoolen was cut off by the natives. They sailed from Batavia to Moco Moro, and thence to Madras, from thence he proceeded to Bencoolen to re-establish the factory. About October, 1720, they returned to Moco Moro. In January, 1721, James Wakeford being ill of an ague, and fever, and flux, whereof he died in the hospital at Moco Moro, being asked by J. Potter and M. Sams to make his will, replied, "I give all I have to my master, and I will give nothing from him, and I'll make no other will; he may dispose of it as he pleases." On the 22nd of January, two days after his death, the witnesses signed a schedule of the contents of the will, and made oath thereof at Moco Moro; Potter died on the passage. This will is propounded by Governor Pyke as a nuncupative will, and opposed by Shearman, one of the next of kin. The arguments are given shortly. The stat. 29 Car. 2, c. 3, s. 23, does not extend to every soldier in actual military service, or to every mariner or seaman being at sea;—the exception is not restrained to an engagement, it is not from the imminence of the danger, but from their state and condition, being supposed to be ignorant and destitute of assistance. By the civil law, a will made *jure militari* continued good a year; if the danger were the only reason, that ceasing, the will would become void. Instit. Bk. 2, tit. 2, sec. 3. —*Quatenus militant et in castris degunt.*"—In point of fact the arguments were the same as on the present occasion: Calvin's definition of the word *expeditio*, was referred to, as was also the passage in Cujacius. On the other hand, the argu-

ment for the next of kin was this,—“The Court, upon the plea, directed they should set forth the expedition.”—It seems from this, that the allegation propounding the nuncupative will, had been objected to, as not setting forth the expedition, and the Court had directed it to be set forth.—“It must be under actual engagement, attended with danger, otherwise mounting guard at Whitehall, would be sufficient; the expedition was over before he was in the hospital; refer to *Key v. Jordan*, 1712. A mariner made a nuncupative will at land; he was going on board next day, not allowed the privilege.” The words of the Court, in pronouncing sentence, are these,—“It is agreed, the will cannot be good unless within the privilege. A mariner on shore is not within the statute. Those who are enlisted in the service of the Company have the same privilege as those in the service of the Crown, and though he acted as cook, it does not take away the privilege of the soldier. *He was not only a soldier, but was upon an expedition.* The proof is not clear whether the expedition was over or not, one witness swears he died on the passage, he was certainly engaged in the service.”—Will pronounced for. It appears doubtful on what particular grounds the decision turned, whether on the ground that the privilege extended to all persons in the service, or whether, that the expedition was not over, but was returning, when he fell ill, and died in the hospital. The Court puts it thus,—“One witness swears he died on the passage; he was certainly engaged in the service.” This decision, so far as it goes, would have been an authority precisely in point, if the will had been pronounced for, on the ground that the

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testator was a soldier, on an *expedition*, and died on the passage; unquestionably, in such case, the will was privileged; but, unfortunately, the language of the judgment renders it doubtful on what the judgment really turned. The Judge was Dr. Bettesworth; he evidently considered that the question had never received a decision; it also appears that, in the first instance, he had directed the allegation to be reformed, by setting forth the expedition on which the deceased was engaged.

Being of opinion from the result of the investigation of the authorities, that the principle of the exemption, contained in the 11th section of the Act, was adopted from the Roman law: I think it was adopted with the limitations to which I have adverted, and that by the insertion of the words *actual military service*, the privilege, as respects the British soldier, is confined to those who are *on an expedition*. The question, then, comes to be considered, what was the situation of Major-General Drummond, at the time when he made his will? that is to be found in the 5th article. [The Court read it.] The terms of the article apply to every full-pay officer and soldier—"liable to be sent abroad," so is every soldier in the service;—"subject to be tried by a court-martial,"—so is every officer and soldier in the service.

On these grounds I think this will not entitle to probate; it is not attested in manner and form prescribed, as to all wills, which bear date after the 1st of January, 1838; and it is not within the exception of the 11th section of the statute, that is, it is not made by a soldier in actual military service. Therefore, I am of opinion that this allegation cannot be admitted to proof; all the facts which could

enable the Court to form an opinion on the point
are brought forward by the allegation.

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I am of opinion that I must reject this allegation :
in doing so, I feel great pain, but I think it better
to express my decided opinion in the first instance,
in order that persons in the situation of the late
General Drummond may be made aware how the
law stands on this point, and that the families of
officers in Her Majesty's service may not be placed
in doubt and difficulty, as to the validity of a will
so made.

I am not prepared to say that the privilege is one
which it would be advantageous to the army, as a
body, to possess ; I think it would not be unlikely
to lead to fraud and misapprehension.

I reject this allegation.

CONSISTORY COURT OF LONDON.

DYSART against DYSART.

1843.

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In this case a libel had been given in on the part
of the Earl of Dysart, seeking restitution of con-
jugal rights. A defensive allegation had been
admitted on behalf of the Countess of Dysart, and
the personal answers of the Earl of Dysart taken
thereto.

The personal answers were excepted to.

The *Queen's Advocate* and *Haggard* for the
Countess of Dysart.

Pleading.—
Answers.—
Every aver-
ment of a plea
must be fully
answered,
except where
the answer
might crimi-
nate the party.
Answers must
not be re-
dundant.
Redundancy
defined.

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Addams and Harding for Lord Dysart.

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JUDGMENT.

DR. LUSHINGTON.

I have now to determine, whether certain objections which have been taken to the answers given in by Lord Dysart to certain of the articles of the allegation, admitted in this cause on behalf of Lady Dysart, ought to be maintained.

The allegation, on the part of Lady Dysart, is given by way of defence, to the libel of Lord Dysart, which seek for restitution of conjugal rights. The principles which govern questions of this kind are so clear, and have been so often defined, that it is unnecessary to repeat them with any minuteness,—I say clear, because, although occasionally there may be some difficulty in their application, the general rules on this branch of practice are well established:—answers should be *sufficient*, that is, all the averments, contained in the articles of the allegation to be answered, should be distinctly and specifically answered, if the facts pleaded in the articles are in the knowledge of the party answering, by admission or denial, if not, by the party declaring his belief or disbelief, or stating that he cannot form a belief or disbelief on the subject. To this general rule I am not aware of any recognised exception, save one, I mean where the answers might criminate the respondent. Under this reservation I am of opinion that the decision in *Swift v. Swift* (a), properly comes. I have read and considered that case, and I have, in my own mind, come satisfactorily to the conclusion that Sir J. Nicholl was right in holding, that Mr. Swift was

(a) 4 Hag. 154.

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not bound to answer the particular article to which his answers were sought to be enforced, but was privileged from doing so, and on the principle I have just adverted to, and on no other. Perhaps there are some words used by Sir J. Nicholl which might bear an extended interpretation, to a degree which would amount to great inconvenience, for he says, "My impression is, that a party is entitled to protection, not only if the answer may tend to criminate, but even to degrade him."

The last is a question I do not propose to enter into, it is a question upon which very different opinions have been entertained in other Courts. I think, that in the case of *Swift v. Swift*, it was clearly the opinion of Sir J. Nicholl, that to call on Mr. Swift to admit, that he had made an abjuration of his religion, which abjuration was not intended to have any effect, save for a particular purpose, was in itself a criminatory inquiry;—of that opinion I am also. The next rule is, that answers should not be *redundant*. It may not, perhaps, be easy to define the meaning of this term in a short sentence, but the true meaning I take to be this,—the respondent is not to insert in his answer any matter foreign to the articles he is called upon to answer, although such matter may be admissible in plea, but he may, in his answer, plead matter by way of explanation pertinent to the articles, even if such matter shall be solely in his own knowledge, and to such extent incapable of proof; or he may state matter which can be substantiated by witnesses; but, in this latter instance, if such matter be introduced into the answer, and not afterwards put in plea, or proved, the Court will give no

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weight or credence to such part of the answer. I do not think, that on the present occasion these rules are substantially denied, but it has been contended, on the part of Lord Dysart, first, that the objections refer to none of the important parts of Lady Dysart's allegation, and that, whether the answers are sufficient in these respects or not, the result of the case cannot be affected; secondly, that many of the objections refer to parts of the allegation, which parts are in themselves not properly admissible. It appears to me, that there is very great difficulty in acceding to either of these arguments; I do not see how in justice, or with confidence in my own judgment, I can decide on a partial view of a case, as is afforded on a discussion on answers, whether the omission to answer any particular point, would or would not be material to the ultimate result of the cause. Much might appear *prima facie*, in this stage of the cause to be immaterial, which, when the evidence was taken, might assume a different complexion. I think, therefore, that the general rule does not admit of this exception, although at the same time I think the rule itself ought not to be applied with pedantic or unnecessary strictness. With regard to the second part of the argument, I think there are still stronger reasons against it: when once an allegation has been admitted, either on debate or otherwise, it is too late to consider whether any parts of it are admissible or not; such a course would lead to confusion, expense and uncertainty. The Court would, on objections to an answer, have to take the whole of the pleadings into its consideration; counsel must be heard to show that an

admitted allegation is *admissible*,—a contradiction in terms; evidence might have been taken, and yet answers be denied. It may be true that arguments on pleas are sometimes inconvenient to the parties, and, therefore, some pleas are admitted without opposition; but those who take the benefit of this course must also take the chance of the countervailing inconvenience; indeed, I know not whether mischief might not arise in another and worse shape, for a discussion of an admitted allegation, on answers, must be more partial and injurious than a discussion on the admissibility of a plea: when a plea stands for admission, the whole subject matter of it becomes open to argument; so far as any explanation can be afforded, by a statement accompanying the answers, it may be given, but if objections to all the small parts of a plea are to be gone into on a discussion on the answers, it is impossible to say to what an extent injustice and prejudice may not arise.

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PREROGATIVE COURT OF CANTERBURY.

BLAKE v. KNIGHT.

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EDMUND BLAKE, formerly a clerk or writer in a solicitor's office, died on the 17th day of December, 1838. The deceased had made a will, dated the

Positive affirmative evidence, by the subscribed witnesses, of the fact of signing or

acknowledging the signature of a testator in their presence, is not absolutely essential to the validity of a will. The Court may presume due execution by a testator upon the circumstances.

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6th of September, 1838, contained on one side of sheet of paper, all in his handwriting. The attestation clause was as follows :

“ Signed, sealed, published, and declared by the said Edmund Blake, the testator, as, for, and to his last will and testament, in the presence of us, who in his presence, at his request, and in the presence of each other, have subscribed our names as witnesses, the words ‘dated twenty’ in the seventeenth line having been first obliterated.” This will was signed at the end thereof by the testator, and the attestation clause was subscribed by three witnesses ;—William Brewer.—Charles Sellick.—George Brewer. Probate of this will was, on the 3rd of January, 1839, granted to Mr. James Knight, the sole executor named therein. The purport of the will was, to bequeath to the widow of the deceased, an annuity of 150*l.* for life, and to give the whole of his property, amounting to about 7000*l.*, subject to the annuity, to the executor, Mr. Knight, an intimate friend, but no relation of the deceased. Mrs. Blake, the widow of the deceased, died in the month of February, 1842.

In the month of June, 1842, a citation issued from this Court, at the instance of Mr. John Blake, a brother, and sole next of kin of the deceased, and the party, who in conjunction with the widow, was entitled in distribution to his personal estate and effects in case he had died intestate ; it called on the executor to bring into, and leave in the registry of the Court, the probate of the said will, and to propound the same in solemn form of law, or to shew cause, why letters of administration of the estate and effects of the deceased, as having died

intestate, should not be granted according to law.

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To this citation Mr. Knight appeared, and brought in the probate, and propounded the will in a common *condidit*.

The three attesting witnesses were examined. The result of their evidence was, that the deceased did not sign the will in their presence; that he did not formally acknowledge his signature to them; that they did not see his signature on the face of the will at the time they subscribed; that there was no seal to the will at the time they subscribed. They admitted that the deceased spread the will open on the table before him; that he said, "it was his will, written all on one side of the paper; that he had made a mistake, but rectified it at the bottom, and pointed out the place to them; that he read the words 'this is the last will and testament of me, Edmund Blake.'" The witnesses would not undertake to swear, that the name of the deceased was not signed to the will at the time they subscribed.

Addams and Elphinstone for the executor.

This is not an attempt to impeach a will by reason of incapacity in the testator, or of fraud or undue influence in obtaining it, but on the ground of defective execution.

This suit is commenced three years and a half after the death of the testator, and the witnesses are called on to speak to facts after this lapse of time. In *Chambers v. The Queen's Proctor* (a), the witnesses to a will were examined three months

(a) 2 Curt. 433.

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after the time of execution, and deposed confidently that the testator did not sign the will in their presence; the Court refused to trust to the memory of witnesses, even after so short an interval of time as had elapsed between the occurrence of the fact they were deposing to, and the time of deposing.

The probabilities of this case are strongly in favour of a due execution; the testator was a clerk or writer to an attorney, a situation in which he must have been daily in the habit of witnessing the execution of legal instruments; indeed, the attestation clause to this will, shews the knowledge and extreme accuracy of this person in these matters. The transaction was conducted with great solemnity, the will was produced, spread open, the attention of the witnesses pointedly called to the mistake in the seventeenth line, and its correction in the attestation clause. All the witnesses admit that the testator read or spoke these words "this is the last will and testament of me, Edmund Blake;" to what could they refer, but to his signature at the end of the will; if so, there is a most formal acknowledgment,—provided the Court shall be of opinion, on the circumstances, that the will was ready signed at the time.

Even assuming that the testator had not uttered the formal words of acknowledgment in reference to his signature, if the Court believes the signature to have been made before the witnesses subscribed, the production of this paper, admitted to be all in the handwriting of the testator, to the witnesses, with a request to them to sign, is a sufficient compliance with the statute.

Haggard and Harding contra.

There is no affirmative evidence whatever of the act of signing or acknowledging a signature, which distinguishes this case from *Chambers v. The Queen's Proctor*; in that case one of the three attesting witnesses deposed confidently to the will having been signed in the presence of himself and of the other two witnesses; the Court held that affirmative was better than negative evidence; but the Court has never decided that all affirmative evidence can be dispensed with. The witnesses in the present case are positive that the will was not signed in their presence, they are equally positive that there was no seal affixed to it at the time they subscribed, and they are nearly as confident that there was no signature on the paper made at the time.

This case resembles *Ilott v. Genge* (a).

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Reply. In *Ilott v. Genge* there was evidence that the testator had carefully concealed his signature from the witnesses at the time of attestation; and that fact standing uncontradicted, excluded the presumption of acknowledgment of an existing signature. In this case every thing was done in the most open manner; the two cases, therefore, are very distinct in their nature. *Chambers v. The Queen's Proctor* was cited, for the purpose of shewing how important an ingredient, in this case, is the lapse of time which has intervened between the execution of this will and the examination of the witnesses.

The circumstance of this suit not being brought until after the death of the widow, is one not very favourable to the cause of the next of kin.

(a) 3 Curt. 160.

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SIR HERBERT JENNER FUST.

The deceased in this case is a Mr. Edmund Blake, who died on the 17th of December, 1838, having made a will which bears date the 6th of September, in that year, and of which probate was granted on the 3rd of January 1839.

In June 1842, the deceased having been dead between three and four years, this probate was called in, and the executor, who had been in possession of the probate since January 1839, was called on to propound the will in solemn form of law.

The will has now been propounded; it is all in the handwriting of the deceased, and appearing, as it does, to have been signed by the deceased in the presence of two witnesses, who, according to the attestation clause, had subscribed in his presence, and in the presence of each other, probate of it passed in the common form.

The purport of the will, is to make provision for the widow of the testator; an annuity of 150*l.* is given to her, and the bulk of his property is given to Mr. Knight, whom he appoints sole executor. The widow, therefore, had an annuity of 150*l.*, out of the property, which at the time when the will was proved, was sworn to be of the value of 7000*l.* The widow, if the deceased had died intestate, would have been entitled to a moiety,—there were no children,—and the brother, who was the only next of kin, would have been entitled to the other moiety. The interest of the widow would have been much larger under an intestacy, than under the will; for she was of such an age that an annuity of 150*l.* was not equivalent to a sum of 3500*l.* sterling; taking that

to be the amount of a moiety of the deceased's property.

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Mr. John Blake the brother did not, on the death of the deceased, or shortly afterwards, question the validity of this will, or take any steps to call in the probate, but in February 1842, he resorts to a step, which unquestionably he is entitled to do, he calls in probate of this will, and puts the executor on proof of it. Now, as I have said, Mr. John Blake is entitled to do this, but considering the time at which he has chosen to do so, he is not entitled to any indulgence in this cause; he is entitled to have the law strictly administered, but to nothing beyond it; he must take the result of the case on the whole of the transaction.

The will has been propounded in the mere common *condidit*, except in this, it pleads, "That the whole of the will, and of the attestation clause is in the handwriting of the deceased." There are three subscribing witnesses to the will, they have been examined, as have also two other persons to the fact of the handwriting; but before I proceed to consider the evidence, I will look a little to the will itself.

The deceased is described as having been a lawyer, or in the service of a lawyer; the will bears the marks of having been written by a person conversant with legal business; it is written in a clear and, evidently prepared with great care; it describes the property of which the deceased was possessed; in one part of the will some words were inserted by mistake, they are struck out, and are adverted to in the attestation clause; it is signed "Edmund Blake"; it is sealed; there are three subscribing witnesses, and the attestation clause is very special in itself.

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The Court read it *ante*, p. 548.] Nothing can more distinct and clear than these words; with such an attestation clause as this, it seems scarcely possible that any question could arise, as to such a paper being executed according to the due requisites of law.

It is now necessary to consider what is the evidence of the witnesses; remembering, that by the present Act of Parliament, a will, to be valid, must be signed by the testator, or by some other person in his presence and by his direction, and that such signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, who are to attest and subscribe the will in the presence of the testator.

The first witness is William Brewer, aged 62. He says to the first article, "I knew the deceased almost all my life, he had been writer to an attorney, but lived independent at last. I cannot say exactly what his age was, it might be seventy or more. One day, it may be three years ago, I was told that a message had been left for me by the deceased's wife, it was to the effect, that Mr. Blake was wanting me, my son, and my apprentice, to go up to him to sign his will, or witness his will. I do not remember what part of the year it then was, or what time of day, whether daylight or candlelight, it was in the evening. I went to the deceased's house, with my son and my apprentice; when we got to the door Mrs. Blake opened it, and shewed us into a small room on the ground floor where the deceased always sat; as she shewed us in she said to the deceased, who was sitting with his back towards us, "Here's Mr. Brewer and his son come," the deceased turned

round on his chair to look at us, I sat down on one side of him near the fire, the other two a little off from him on the other side; the room was very small; there was nobody else in the room. The deceased took out a paper either from a drawer of the little table at which he was sitting, or from a portable writing desk, that stood or lay upon it; it was folded, he spread it before us, saying 'This is my will, it is a small will written on one sheet of paper and all on one side:' turning to me he said, 'Will you sign it,' or 'Will you witness it.' I took the pen and wrote my name, most likely the deceased told me where to write it. As soon as I had wrote my name I went back to my seat. Then he asked the others to sign as I had done, and they did. When they had so done he took and put the will away again, I cannot say whether in the drawer or in the desk. Before either of us signed I remember he said, 'That he had made a mistake, but he had rectified it at the bottom.' He did not sign it in my presence, he did not use pen and ink while I was with him; he did not say that he had written it himself, otherwise than as by what I have deposed. He did not say he had signed it. I cannot say that it had been signed when I saw it; I would not swear that Mr. Blake's name was not to it when I signed mine, but I did not see it, that is, I do not remember that I saw it. I have no recollection at all of having seen Mr. Blake's signature at the foot of the will when I signed my name to it; I am very sure that it was not signed by Mr. Blake the deceased, in my presence, and that he did not say of any name to it, 'that it was his or of his writing,' or anything to that effect. [The witness was shewn and identified the will.] I did not see the name

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'Edmund Blake' at that time, as I see it now, opposite the seal and at the end of the will; there was no seal there then, of that I am certain; I do not think that the name was there, but I do not swear that; I am sure that if it was there the deceased did not, by anything he said, acknowledge it to be his signature; he did no more than say, it was his will and that it was a short or a little will, and he spoke also of the mistake he had made and rectified it at the bottom. I think now that, when he held the paper in his hand, telling us that it was his will, I read the first words to us—'This is the last will and testament of me, Edmund Blake'—as much as that I think he read aloud."

According to this witness the deceased produced the paper from the drawer of a table or writing desk; he spread it upon the table, he called the attention of the witnesses to a correction; and mention was made of that correction in the attestation clause; I read so much of it as, "This is the last will of me Edmund Blake," he asked this witness, and the other witnesses to sign this, which he declares is his will; the witness however will not undertake to swear that the name of the deceased was there; he is sure the deceased did not sign it in his presence and he is sure he did not formally acknowledge it when he attested it.

On cross-examination he says, "The deceased was sitting at a little table, not far from the fire-place there was just room enough for me to sit, as I did almost by the side of him, nearer the fire, rather before than behind him; his wife sat opposite me on the other side of the deceased. Each person in the room could see what any one of the others did. When I was about to sign my name I left my place

and went round to the deceased ; I was at his right hand when I wrote my name ; the only way in which that change of my position could affect the view of the other witnesses would be, as I should suppose, that they saw almost better what I did than if I had been on the side of the deceased on which I sat.

The next witness is Charles Sellick, the apprentice, he was about seventeen years of age at the time of the transaction. After deposing to going to the house of the deceased, the size of the room, the position in which the parties sat, to the same effect as the former witness, he says,—“ Mr. Blake took his will from a writing desk, brought to him by his wife, he took it up and said, ‘ Mine is a short will, it is written on one sheet of paper.’ He asked the elder Mr. Brewer to put his name to it, and for that purpose to sit down at a table on Mr. Blake’s right hand, on which table Mr. Blake then placed it, open as I recollect ; Mr. Brewer wrote his name where Mr. Blake pointed out to him, Mr. Brewer, the younger, and I did the same, Mr. Blake pointing out the place to each of us in turn. Mr. Blake read a part of the beginning of the will, just as much as said that it was his will, and he pointed out to us a place in the middle of the will where he had made a mistake, which he said he had corrected at the bottom. I remember he made us all stand up to see where the mistake had been made, and where he had written the correction of it at the bottom. I am sure Mr. Blake did not sign the will then, or at any time in my presence ; I do not remember having seen his name to the will, and I am quite positive he did not point it out to me. I do not remember that he said anything, or that anything else was

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said or done in my presence concerning the will. [The witness was shown and identified the will. I will swear to the best of my belief that the name 'Edmund Blake,' appearing at the foot or end of the will, between the clause of attestation and the seal, was not written, that is, had not been written and was not upon it when I wrote my name as witness. I was a youngster, I was unused to the form of such things, I did not think anything of it. I am quite certain that the seal was not there at the time now deposed of. I will not swear positively that the name was not there, but only that I do not remember it."

On cross-examination.—"I signed my name with each of the others signed, they and I were present alike with Mr. and Mrs. Blake. It was a very small room, nothing could be done without seeing it. I do not well know that Mr. Brewer, the elder, could see as he sat what was done by me and Mr. George Brewer; the only change in position was in the witnesses, each of us going in turn to the chair put for us at the table, on which the will was placed. The will lay on the table; I did not know the contents of the clause of attestation, I was required to put my name, and I did."

According to this witness, he went to the deceased's house, the deceased produced a will, all in his own handwriting; he pointed out to the attention of the witness an alteration in the body of the will, the attestation clause notices the alteration; the paper was spread open, there was no concealment, the attention of the witness was fully called to all the circumstances;—he swears that according to his belief the name of the deceased was not

signed, and that the signature of the deceased was not there.

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The third witness is George Brewer, after deposing as to going to the house, and as to the seats and positions of the several parties in the room, he says,—“Mrs. Blake brought a writing-desk, which she put on the table. Mr. Blake took from it the paper we were to sign, whether it was a folded paper or not I cannot say. He held it up by one corner, and told us how it was his will, and something about a mistake he had made in it, and how he had rectified it at the bottom. He showed us where the mistake had been.”

Here is this gentleman pointing out the alteration or correction, and saying the will was all in his own handwriting, surely this must have a most important bearing on the case.

“He read some of it to us, some of the top part, and some of the bottom; he said there was but one side of it; it was all written on one side of a sheet. The next thing was we signed it. I do not know about Mr. Blake signing it, I cannot say whether he did or not. I did not take any notice of that. I remember Mr. Blake dipping the pen in the ink and giving it to us, but whether he wrote anything with it himself or signed his name to it I cannot say. I do not remember anything about a seal to it, or anything about Mr. Blake publishing or declaring it to be his will.” [After identifying the will.] “I cannot say whether the name Edmund Blake, opposite to the seal, at the foot or end of the will, was there or not when I so wrote my name as a witness. I cannot say whether the seal was there at the time or not.”

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On cross-examination.—“The will in question was on a table by the right hand of the deceased when it was being signed by me and my fellow witnesses. I did not know the contents of the clause of attestation to it when I signed my name.”

How can this be! When Mr. Blake had taken such pains to point out the alteration in the will and in the attestation clause to the witnesses; how is it possible on such evidence to believe that the testator did not sign before the witness subscribed

“I would not swear that it is not what Mr. Blake read, but my memory will not serve me to say if it were or not. I was not paying particular attention to what was read by the deceased. I do not know that I have ever said that Mr. Blake did not sign his will in my presence. I have said as much as that I did not know whether he had so done or not. I have heard Charles Sellick say, that Mr. Blake did not sign in our presence. From what I have heard my father say about it, I think he is something like myself, and cannot exactly say how it was. My memory is a very indifferent one for speaking positive. I do not remember hearing Mr. Blake make any acknowledgment of his signature in my presence. I do not think that I ever heard either my father or Sellick say anything as to that for myself I have said that I did not think he did but what I should say is, that I do not remember how it was.”

The two other witnesses swear to the handwriting of the deceased, one of them, Mr. Read, a solicitor says,—“That he deposes without the least hesitation or doubt that the whole of the paper writing propounded as the will of the deceased, and the

name, Edmund Blake, subscribed thereto, is of the proper handwriting and subscription of the deceased.

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I have already said that until the year 1842, no steps were taken to call in the probate of this will.

These are the circumstances under which this will comes into question; a will attested in the manner I have already mentioned. The witnesses will not swear positively that the deceased's name was not at the bottom of the will when they signed it as witnesses; they will not swear negatively; the last witness swears "that the testator dipped the pen into the ink and gave it to them, but whether he wrote anything with it himself or signed his name he cannot say."

The first point to consider is, is it absolutely necessary to have positive affirmative testimony by the subscribed witnesses, that the will was actually signed in their presence, or actually acknowledged in their presence; is it absolutely necessary, under all circumstances, that the witnesses should concur in stating that these facts took place; or is it absolutely necessary, where the witnesses will not swear positively, that the Court should pronounce against the validity of the will? I think these are not absolute requisites to the validity of a will; I think the Court must take into its consideration all the circumstances of the case, and judge from them collectively, whether there was not at least an acknowledgment of a signature, clearly existing on the face of the will at the time of attestation. I think, under all the circumstances of this case, that the Court can have no doubt that that is what was taken place here. What are the circumstances.

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Three years after the transaction took place the witnesses depose, that they went to the deceased's house to see him sign his will; they were introduced to him; he is described as the writer of the will; they find him sitting in a chair near a fire-place; his wife tells him, the witnesses come to witness his will; he produces this from a desk; he unfolds the paper; he lays it on a table before them, so that each might see what the paper was; he is not satisfied with the paper, he tells them that it is his will; that it is all in his own handwriting; that it is a short will, all on one side of a sheet of paper; that he had made a mistake in the body of the will; that he had rectified the mistake; he pointed out to them where it had been done; he calls on them to come near and see how he had altered the mistake; he reads the attestation clause to them;—everything is done in the most open manner by the deceased; he reads the words, "this is the last will and testament of me, Edmund Blake;" this paper is signed "Edmund Blake;" there is a seal; the witnesses are sure there never was a seal; they are so sure whether he did or not sign in their

I cannot entertain a doubt that the will was signed before the witnesses subscribed; they have no more doubt of the fact, than I have positively sworn to that effect; when I consider the care and caution with which the paper was written, the knowledge of the deceased in the matter, derived from his occupation in the office; he must have known how to make a testamentary paper in the year 1840; I doubt the memory of the witnesses for

1843. and to the statutes 2 & 3 Edw. 6, 1 Eliz. c. 2, and
 April 26th. 13 & 14 Car. 2, c. 4, and *Caudrey's case* (a). The
 SANDERS pressed for a sentence of deprivation against M
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Queen's Advocate for Mr. Head.

The defendant has been most vexatiously treated in this case; the Articles contain no intimation of the particular law or canon to be relied on in support of them; this mode of pleading is contrary to all established practice. In *Newberry v. Goodwin* (b), Sir J. Nicholl says, "The two first Articles plead the law upon the subject, the canons, and the statute;" clearly then, according to that learned Judge, it is incumbent on the promoter of the office to specify the statute or canon on which he relies for establishing the charge contained in the Articles. In the case of *The King's Proctor v. Stone* (c), in *Cox v. Gooday* (d), and in *Masterson v. Escott* (e), the particular statute or canon said to have been infringed or violated was set forth in the Articles, and the defendants were not, as in this case, compelled blindly to address themselves in defence to the charge; the particular law to be urged against them was specified at the very commencement of the proceedings.

The Book of Common Prayer, which Mr. Head is charged with having depraved, is the Book of Prayer now in use, established by the Act of Uniformity, A.D. 1662. The Canons, A.D. 1603 cannot refer to the present Book of Prayer, and

(a) 5 Coke, 1.

(b) 1 Phill. 282.

(c) 1 Cons. 424.

(d) 2 Cons. 138.

(e) 2 Curt. 692.

there is no subsequent canon relating to the present Book of Prayer.

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Harding, (same side.)—Mr. Head is charged with the commission of an offence capital in the Ecclesiastical law, and is entitled to have the law strictly weighed, and construed strictly in his favour. The statute of the 1 Eliz. is, as respects Mr. Head, a penal statute, he must be clearly convicted of having *preached, declared, or spoken* in derogation or depraving of the Book of Common Prayer; it will not be sufficient to shew that Mr. Head is within the spirit of the act, he must be brought within the spirit and the letter. In *Fletcher v. Sanders* (a), Chief Justice *Best* says, "The rule requires that all penal laws should be construed strictly, that no cases should be holden to be reached by them, but such as are within both the spirit and letter of such laws. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of Judges, and not by the express authority of the laws." Mr. Head has not *preached*, and he has not *spoken*, anything in derogation of the Book of Common Prayer; then has he *declared*? The word *declare*, from its juxtaposition with the words *preach* and *speak*, clearly means a *declaration by parol*, he must have *declared by word of mouth*. The rule *noscitur a sociis* applies in the construction of this act, the word *declare*, placed between the words *preach* and *speak*, shews that an *oral declaration* was intended to be forbidden. *Jenkinson v. Thomas* (b), *Evans*

(a) 3 Bing. 580.

(b) 4 T. R. 665

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v. *Evans* (a). By the act of the 14 Geo. 2, c. 1, all persons who should steal *sheep*, or any *other cattle*, were deprived of the benefit of clergy. The stealing of any cattle would seem to be comprehended by the general words, *any other*; but it was found necessary to pass the 15 Geo. 2, c. 34, in order to explain that the first act was meant to extend to all other cattle; until the Legislature specified what cattle were meant to be included, the Judges felt that they could not apply the statute to any other cattle but sheep. The statute of Elizabeth never contemplated the possibility of a clergyman publishing, by printing, anything in derogation of the Book of Prayer; that case was amply provided against in other ways; no person could print any work or letter without being subject to a kind of censorship of the press. Mr. Hallam, in his *Constitutional History* (b), shews the extreme jealousy with which the diffusion of free inquiry through the press was viewed. That the trade of printing was subject to a sort of peculiar superintendence. That the Council frequently issued proclamations to restrain the importation of books, or to regulate their sale. That it was penal to utter, or to possess, even the most learned works on the Catholic side. That every printer was enjoined to certify his presses to the Stationers' Company, on pain of having them defaced, and of suffering a year's imprisonment. No printer was to print any book, matter, or thing whatsoever, until it should have been first perused and allowed by the Archbishop of Canterbury or the Bishop of London. Every

(a) 4 T. R. 224-459.

(b) Vol. 1, p. 233.

person selling books printed contrary to the intent of this ordinance, to suffer three months' imprisonment.

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Can it be wondered at, that the Legislature, in framing the Act of 1 Eliz. should have considered that the offence of *declaring* by printing was amply provided against by the laws and ordinances then in force, and have contented themselves with providing against verbal heresy or schism? It is well known that, at this period, the clergy were in the habit of meeting and discussing theological subjects; these meetings were called "prophesyings," and were rigorously suppressed in those days. It was for attending one of such assemblies that Archbishop Grindal was suspended; this was probably the "declaring" intended to be forbidden by the statute. The reason why the Act of Uniformity did not impose any new penalty on publishing by printing, is explained by referring to the Act of 13 & 14 Car. 2, c. 33, which by the second section provided for the case of printing; that statute is now expired, and cannot be urged against Mr. Head.

The above argument will be borne out by reference to statutes in *pari materia*, in which the word "print" is used when it was the intention of the Legislature to prohibit that mode of publishing opinions; 25 Hen. 8, c. 22, ss. 8, 9; 26 Hen. 8, c. 13, s. 2; 35 Hen. 8, c. 5; 1 Edw. 6, c. 1, s. 1—c. 12, s. 7; 2 & 3 Edw. 6, c. 1; 5 & 6 Edw. 6, c. 11, s. 2; 1 & 2 Phil. & Mary, c. 10; 1 Eliz. c. 2, s. 4; 5 Eliz. c. 1, s. 10; 13 Eliz. c. 2, s. 2; 23 Eliz. c. 2; 35 Eliz. c. 1, s. 1.

The Court will not visit Mr. Head with the

1843. extreme punishment of deprivation; the statute itself makes a distinction between first and second offences.

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The Court, moreover, will distinguish between an offence by speaking in derogation of some great doctrine of universal, or even of Anglican reception and against a Liturgy, which may be altered, which may be termed a "thing indifferent." The preface to the Prayer-Book, itself part and parcel of the statute of Charles 2, notices this. It says, "The particular forms of divine worship, and the rite and ceremonies appointed to be used therein, being things in their own nature, indifferent, and alterable, and so acknowledged; it is but reasonable that upon weighty and important considerations according to the various exigency of times and occasions, changes and alterations should be made therein."

JUDGMENT,

SIR HERBERT JENNER FUST.

June 15th.

This is a proceeding by Articles, against the Rev. Henry Erskine Head, a clerk in holy orders of the United Church of England and Ireland, rector of the Rectory and Parish Church of Feniton in the county of Devon, in the diocese of Exeter and in the province of Canterbury. This proceeding is commenced in this Court in virtue of letter of request, from the Bishop of Exeter, which have been presented under the provisions of the statute passed during the 3rd and 4th years of the reign of her present Majesty, (c. 86,) entitled "An Act for better Enforcing Church Discipline." On these letters being presented and accepted, a decree

issued from this Court on the 14th of Nov. 1841, calling on Mr. Head to answer to certain articles, heads, positions, or interrogatories to be administered to him touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses; and more especially for having offended against the laws, statutes, constitutions, and canons ecclesiastical of the realm, by having written and published, or caused to be published, in a certain Newspaper called "The Western Times," a Letter, entitled "A View of the Duplicity of the present System of Episcopal Ministration, in a Letter addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon;" in which Letter it is openly affirmed and maintained that The Catechism and the Order of Confirmation, in the Book of Common Prayer, contain erroneous and strange doctrine; and wherein are also openly affirmed and maintained other positions in derogation and depraving of the said Book of Common Prayer, contrary to the said laws, statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the Church.

These are the charges contained in the decree or citation, issued and founded on the letters of request. This decree was personally served, and was returned on the 1st of December 1841; on the following Court day, a proctor appeared for Mr. Head, but under protest. This protest was extended, it was discussed in this Court, and finally, the Court was of opinion that the protest was not sustainable, and accordingly the Court overruled it, and assigned

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Mr. Head to appear absolutely, [*ante*, p. 49]. From this order, an appeal was presented to her Majesty in Council, and after some deliberation, the decree was affirmed. It seems that the Judges of the Judicial Committee of the Privy Council had considerable doubt, whether the provisions of the Act of Parliament had been duly complied with; I say this, in order to shew that the appeal was not unjustifiable, for the Judges in the Appellate Court strongly intimated an opinion that the question was one very fair and proper to be brought up for the revision of a superior Court.

The cause having been remitted, Articles were brought in; the admission of them was not opposed. At first, notice was given that the Articles would be opposed, but it was withdrawn, and the Articles were admitted without opposition; a negative issue was thereupon given, and certain admissions made on behalf of Mr. Head, in order to avoid the expense of taking evidence; in consequence, no evidence became necessary, no witnesses were examined. The principal facts being then admitted, the only question then remained, — upon these admissions had an offence been committed cognizable in the Ecclesiastical Court?—this was a question simply of law, and of law only.

Now, it is to be observed that, in the first place, the protest did not apply to the merits of the case; it rested on ground quite independent of the circumstances set forth in the decree or articles. It was simply a question, whether the Bishop of Exeter, the diocesan to whom Mr. Head is subject, had complied with the requisites of the Act of Parliament, (3 & 4 Vict. c. 86); the bishop having in the

first instance given notice that he intended to issue a commission under the 3rd section of the Act. The letters of request were after that presented to this Court, the notice not having been withdrawn; on this the protest was founded. I have already stated that the decree of this Court, overruling the protest, has been held to be right; the cause has been remitted, and now comes on to be heard on its merits, without any prejudice on the one side or the other, by reason of what has passed in the Privy Council.

The Articles are nine in number; the first pleads as follows :—

“We article and object to you, the said Rev. Henry Erskine Head, clerk, that you know, believe, or have heard that, by the laws, statutes, constitutions, and canons ecclesiastical of the realm, it is expressly forbidden to any parson, vicar, or other minister whatsoever, of the United Church of England and Ireland, to say open prayer in any church or chapel, or other place of public worship, or to administer the sacraments, or other rites and ceremonies of the Church, in any other form, or after any other order than those contained in the Book of Common Prayer, and the administration of the sacraments, and other rites and ceremonies of the Church of England by law established : and that it is also expressly forbidden to any such parson, vicar, or other minister of the said United Church of England and Ireland, whatsoever to preach, declare, or speak anything to the derogation or depraving of the said Book of Common Prayer, and administration of the sacraments, and other rites and ceremonies of the Church of England, or of

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my opinion, a case under very different circumstances from the present. In that case, the object of the testator was to conceal his signature,—if it were there at the time,—from the witnesses, the greatest pains were taken to conceal from them what the paper was; here, everything was done in the most open manner.

The result to which I come is, that the Court is not bound to have the positive affirmative evidence of the subscribed witnesses. I am quite satisfied that the name of the testator was signed to the paper before the witnesses subscribed; and I think that his acknowledging this to be his will, it being all in his own handwriting, and his name, as hold, being then signed to it, amounts to a sufficient acknowledgment of his signature. I pronounce for the validity of this paper as a will, and I direct that probate to be delivered out to the executor.

Dr. Haggard.—Does the Court think my party entitled to his costs out of the estate?

SIR HERBERT JENNER FUST.

I much doubt, *Dr. Haggard*, whether I ought not to have condemned your party in the costs. I shall not do that in the present instance, but I certainly shall not give him his costs. I make order as to the costs.

ARCHES COURT OF CANTERBURY.

*The Office of the Judge promoted by
SANDERS against HEAD. (a)*

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THIS cause having been remitted to this Court, the proctor for the promoter of the office, on the first session of Hilary Term, brought in Articles, with two Exhibits annexed. On the second session, the proctor for Mr. Head declared he opposed their admission. On the third session, the Articles were admitted, the proctor for Mr. Head being present, and declaring that he did not oppose the same. On the fourth session, the proctor for Mr. Head gave a negative issue to the Articles; on the bye day, he confessed the second and third Articles to be true, as also so much of the fourth Article as pleaded the writing and causing to be published the letter therein referred to; he also confessed the fifth, sixth, seventh, and eighth Articles to be true. On the 14th of March, the proctor for Mr. Head declared that he gave in no Allegation, whereupon the cause was concluded and assigned for informations and sentence.

A clergyman suspended for three years for publishing in a newspaper, a letter, in derogation and depraving of the Book of Common Prayer.

Where an offence is cognisable by the general ecclesiastical law, Articles need not specify the particular Canon or constitution intended to be relied on as supporting the charges contained in them.

Addams and Robinson, as counsel for the promoter of the office, cited and referred to the 4th, 6th, 36th, 37th, and 38th Canons, (A.D. 1603,)

(a) See this case, *ante*, p. 32 to 49.

1843. and to the statutes 2 & 3 Edw. 6, 1 Eliz. c. 2, and
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Harding, (same side.)—Mr. Head is charged with the commission of an offence capital in the Ecclesiastical law, and is entitled to have the law strictly weighed, and construed strictly in his favour. The statute of the 1 Eliz. is, as respects Mr. Head, a penal statute, he must be clearly convicted of having *preached, declared, or spoken* in derogation or depraving of the Book of Common Prayer; it will not be sufficient to shew that Mr. Head is within the spirit of the act, he must be brought within the spirit and the letter. In *Fletcher v. Sondes* (a), Chief Justice *Best* says, "The rule requires that all penal laws should be construed strictly, that no cases should be holden to be reached by them, but such as are within both the spirit and letter of such laws. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of Judges, and not by the express authority of the laws." Mr. Head has not *preached*, and he has not *spoken*, anything in derogation of the Book of Common Prayer; then has he *declared*? The word *declare*, from its juxtaposition with the words *preach* and *speak*, clearly means a *declaration by parol*, he must have *declared by word of mouth*. The rule *noscitur a sociis* applies in the construction of this act, the word *declare*, placed between the words *preach* and *speak*, shews that an *oral declaration* was intended to be forbidden. *Jenkinson v. Thomas* (b), *Evans*

(a) 3 Bing. 580.

(b) 4 T. R. 665

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v. *Evans* (a). By the act of the 14 Geo. 2, c. 1, all persons who should steal *sheep*, or any *other cattle*, were deprived of the benefit of clergy. The stealing of any cattle would seem to be comprehended by the general words, *any other*; but it was found necessary to pass the 15 Geo. 2, c. 34, in order to explain that the first act was meant to extend to all other cattle; until the Legislature specified what cattle were meant to be included, the Judges felt that they could not apply the statute to any other cattle but sheep. The statute of Elizabeth never contemplated the possibility of a clergyman publishing, by printing, anything in derogation of the Book of Prayer; that case was amply provided against in other ways; no person could print any work or letter without being subject to a kind of censorship of the press. Mr. Hallam, in his *Constitutional History* (b), shews the extreme jealousy with which the diffusion of free inquiry through the press was viewed. That the trade of printing was as subject to a sort of peculiar superintendence. That the Council frequently issued proclamations to restrain the importation of books, or to regulate their sale. That it was penal to utter, or to possess, even the most learned works on the Catholic side. That every printer was enjoined to certify his presses to the Stationers' Company, on pain of having them defaced, and of suffering a year's imprisonment. No printer was to print any book, matter, or thing whatsoever, until it should have been first perused and allowed by the Archbishop of Canterbury or the Bishop of London. Every

(a) 4 T. R. 224-459.

(b) Vol. 1, p. 233.

person selling books printed contrary to the intent of this ordinance, to suffer three months' imprisonment.

Can it be wondered at, that the Legislature, in framing the Act of 1 Eliz. should have considered that the offence of *declaring* by printing was amply provided against by the laws and ordinances then in force, and have contented themselves with providing against verbal heresy or schism? It is well known that, at this period, the clergy were in the habit of meeting and discussing theological subjects; these meetings were called "prophesyings," and were rigorously suppressed in those days. It was for attending one of such assemblies that Archbishop Grindal was suspended; this was probably the "declaring" intended to be forbidden by the statute. The reason why the Act of Uniformity did not impose any new penalty on publishing by printing, is explained by referring to the Act of 13 & 14 Car. 2, c. 33, which by the second section provided for the case of printing; that statute is now expired, and cannot be urged against Mr. Head.

The above argument will be borne out by reference to statutes in *pari materia*, in which the word "print" is used when it was the intention of the Legislature to prohibit that mode of publishing opinions; 25 Hen. 8, c. 22, ss. 8, 9; 26 Hen. 8, c. 13, s. 2; 35 Hen. 8, c. 5; 1 Edw. 6, c. 1, s. 1—c. 12, s. 7; 2 & 3 Edw. 6, c. 1; 5 & 6 Edw. 6, c. 11, s. 2; 1 & 2 Phil. & Mary, c. 10; 1 Eliz. c. 2, s. 4; 5 Eliz. c. 1, s. 10; 13 Eliz. c. 2, s. 2; 23 Eliz. c. 2; 35 Eliz. c. 1, s. 1.

The Court will not visit Mr. Head with the

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The Court, moreover, will distinguish between
 an offence by speaking in derogation of some great
 doctrine of universal, or even of Anglican reception
 and against a Liturgy, which may be altered, which
 may be termed a "thing indifferent." The preface
 to the Prayer-Book, itself part and parcel of the
 statute of Charles 2, notices this. It says, "The
 particular forms of divine worship, and the rites
 and ceremonies appointed to be used therein, be-
 lieved to be things in their own nature, indifferent, and alter-
 able, and so acknowledged; it is but reasonable,
 that upon weighty and important considerations,
 according to the various exigency of times and
 occasions, changes and alterations should be made
 therein."

JUDGMENT,

SIR HERBERT JENNER FUST.

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This is a proceeding by Articles, against the
 Rev. Henry Erskine Head, a clerk in holy orders
 of the United Church of England and Ireland,
 rector of the Rectory and Parish Church of Feniton,
 in the county of Devon, in the diocese of Exeter,
 and in the province of Canterbury. This proceed-
 ing is commenced in this Court in virtue of letters
 of request, from the Bishop of Exeter, which have
 been presented under the provisions of the statute
 passed during the 3rd and 4th years of the reign
 of her present Majesty, (c. 86,) entitled "An Act for
 better Enforcing Church Discipline." On these
 letters being presented and accepted, a decree

issued from this Court on the 14th of Nov. 1841, calling on Mr. Head to answer to certain articles, heads, positions, or interrogatories to be administered to him touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses; and more especially for having offended against the laws, statutes, constitutions, and canons ecclesiastical of the realm, by having written and published, or caused to be published, in a certain Newspaper called "The Western Times," a Letter, entitled "A View of the Duplicity of the present System of Episcopal Ministration, in a Letter addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon;" in which Letter it is openly affirmed and maintained that The Catechism and the Order of Confirmation, in the Book of Common Prayer, contain erroneous and strange doctrine; and wherein are also openly affirmed and maintained other positions in derogation and depraving of the said Book of Common Prayer, contrary to the said laws, statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the Church.

These are the charges contained in the decree or citation, issued and founded on the letters of request. This decree was personally served, and was returned on the 1st of December 1841; on the following Court day, a proctor appeared for Mr. Head, but under protest. This protest was extended, it was discussed in this Court, and finally, the Court was of opinion that the protest was not sustainable, and accordingly the Court overruled it, and assigned

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Mr. Head to appear absolutely, [*ante*, p. 49]. From this order, an appeal was presented to her Majesty in Council, and after some deliberation, the decree was affirmed. It seems that the Judges of the Judicial Committee of the Privy Council had considerable doubt, whether the provisions of the Act of Parliament had been duly complied with; I saw this, in order to shew that the appeal was not unjustifiable, for the Judges in the Appellate Court strongly intimated an opinion that the question was one very fair and proper to be brought up for the revision of a superior Court.

The cause having been remitted, Articles were brought in; the admission of them was not opposed. At first, notice was given that the Articles would be opposed, but it was withdrawn, and the Articles were admitted without opposition; a negative issue was thereupon given, and certain admissions made on behalf of Mr. Head, in order to avoid the expense of taking evidence; in consequence, no evidence became necessary, no witnesses were examined. The principal facts being then admitted, the only question then remained, — upon these admissions had an offence been committed cognizable in the Ecclesiastical Court?—this was a question simply of law, and of law only.

Now, it is to be observed that, in the first place, the protest did not apply to the merits of the case; it rested on ground quite independent of the circumstances set forth in the decree or articles. It was simply a question, whether the Bishop of Exeter, the diocesan to whom Mr. Head is subject, had complied with the requisites of the Act of Parliament, (3 & 4 Vict. c. 86); the bishop having in the

First instance given notice that he intended to issue
a commission under the 3rd section of the Act.
The letters of request were after that presented to
this Court, the notice not having been withdrawn;
on this the protest was founded. I have already
stated that the decree of this Court, overruling the
protest, has been held to be right; the cause has
been remitted, and now comes on to be heard on its
merits, without any prejudice on the one side or the
other, by reason of what has passed in the Privy
Council.

The Articles are nine in number; the first pleads
as follows:—

“We article and object to you, the said Rev.
Henry Erskine Head, clerk, that you know, believe,
or have heard that, by the laws, statutes, constitu-
tions, and canons ecclesiastical of the realm, it is
expressly forbidden to any parson, vicar, or other
minister whatsoever, of the United Church of
England and Ireland, to say open prayer in any
church or chapel, or other place of public worship,
or to administer the sacraments, or other rites and
ceremonies of the Church, in any other form, or after
any other order than those contained in the Book
of Common Prayer, and the administration of the
sacraments, and other rites and ceremonies of the
Church of England by law established: and that it
is also expressly forbidden to any such parson,
vicar, or other minister of the said United Church
of England and Ireland, whatsoever to preach,
declare, or speak anything to the derogation or
depraving of the said Book of Common Prayer, and
administration of the sacraments, and other rites
and ceremonies of the Church of England, or of

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anything therein contained, or of any part thereof; and that all ordinaries are empowered to take cognizance of such offences committed within the limits of their several jurisdictions, and to punish the offenders by admonition, or suspension, or deprivation, according to the exigency of the case. And we article and object of this, &c."

The first Article, therefore, states generally the law contended to be applicable to the condition in which Mr. Head has placed himself.

The second Article pleads,—“That the said Rev. Henry Erskine Head hath for many years last past been, and now is a priest or minister in holy orders of the United Church of England and Ireland; and for several years has been and now is rector of the Rectory and Parish Church of Feniton, in the county of Devon, in the diocese of Exeter, and province of Canterbury, and has been rightly and lawfully instituted and inducted in and to the said rectory; and that, for, and as such, and as the lawful rector of the said rectory has been for several years last past, and now is commonly accounted reputed and taken to be.”

The third Article exhibits in supply of proof the act of institution.

The 4th Article contains the commencement of the charge against Mr. Head: it pleads, “Also we article and object to you, the said Rev. Henry Erskine Head, clerk, that you, in the month of August, in the year of our Lord 1841, wrote and published, or caused to be written and published within the diocese of Exeter, to wit, in a certain newspaper, called, “The Western Times,” dated, Exeter, Saturday, August 21st, 1841, a letter,

entitled, "A View of the Duplicity of the present System of Episcopal Ministration, in a Letter addressed to the Parishioners of Feniton, Devon; occasioned by the Bishop of Exeter's circular, on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon;"—in which letter, you advisedly affirmed and maintained, that the Catechism, the order of Baptism, and the order of Confirmation, in the Book of Common Prayer, contain erroneous and strange doctrine, and wherein you so advisedly affirmed and maintained other positions, in derogation and depraving of the said Book of Common Prayer, contrary or repugnant to the laws, statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the Church."

The 5th Article contains certain passages of the Letter so specified, in the general charge of the 1st Article, as containing erroneous and strange doctrine, and in which positions are advisedly maintained in derogation and depraving of the said Book of Common Prayer, and among them of the Catechism.

The 6th Article pleads, "That Mr. Head has admitted that he published the Letter, to which I have already alluded.

The 7th Article pleads,—That by reason of his having published, or caused to be published this Letter, "there was, and is, a scandal and evil report, in the said diocese, against you, the said Henry Erskine Head, as having offended against the laws Ecclesiastical: and that, by reason thereof, and of a certain act or statute, made in the Parliament holden at Westminster, in the 3d and 4th

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years of the reign of Her present Majesty, entitled, "An Act for better enforcing Church discipline," and of the letters of request, under the hand and seal of the Bishop of the said diocese of Exeter. presented and accepted in this cause, you were, and are, subject to the jurisdiction of this Court."

The 8th is a mere formal Article ; as is also the 9th, it alleges,—“that all and singular the premises were, and are true, public, and notorious,” and concludes, by praying, “That the Rev. Henry Erskine Head, clerk, may be duly and canonically corrected and punished, and may be condemned in the costs of the cause.”

This is the substance of the charge. When the Articles were admitted, a negative issue was given ; that is the usual formal mode of proceeding ; afterwards certain admissions were made by Mr. Head. It is necessary to refer to these admissions, in order to show that the facts of the case were all admitted, although the law resulting from them was not admitted. Now, Mr. Head admits the truth of the 2d and 3d Articles ; he also admits so much of the 4th article, as pleads,—“that he is the author and publisher, or the cause of publishing,” the Letter in question, but he does not admit, that it contains erroneous doctrine, or doctrine depraving of the Book of Common Prayer : that is the question to be tried, by referring to the expressions made use of in the Letter. Mr. Head also admits the 5th, 6th, 7th, and 8th Articles, admitting that so many of the passages from the Letter, as are contained in the 5th Article, to be true extracts from the Letter published in “The Western Times.”

I have already stated, that when these Articles

were given in, an intimation was made that they would be opposed, but that was afterwards withdrawn; *primâ facie*, this would seem to admit, that the articles, if proved, would contain a charge, rendering Mr. Head liable to Ecclesiastical censure and punishment. In the argument, however, it was contended, that Mr. Head was not bound to raise his objections to the charge, on the admissibility of the Articles, but that his Counsel might at any time take any objections, as might seem most expedient to them for the interest of their client, and that, if there be any sustainable objection, Mr. Head is not precluded from taking it by reason of having permitted the Articles to be admitted without opposition: I am inclined to take that view of the case, and to hold, that a party is not obliged to object to Articles at the time they stand for admission, but is at liberty at any time, up to the hearing, to urge any objections to them, and to have all benefit of such objections in the decision of the cause.

It now becomes necessary to consider the nature of the objections to which the attention of the Court has been called.

It has been made a subject of complaint, on behalf of Mr. Head, that the Articles do not contain any specification of the law relied on to establish them; that the first Article is merely general, and that, under such general pleading, it is difficult for a defendant to know how to address himself to the question of law applicable to his case; that the Canon Law has been referred to generally without particular specification. Certain cases have been referred to in which, in proceedings of this nature, the specific statute or Canon, on which the Articles

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were founded, has been particularized, and it is contended, that, in this case, the same course ought to have been pursued, the cases more particularly alluded to are, *The King's Proctor v. Stone* (a), *Newberry v. Goodwin* (b), *Cox v. Goodday* (c), *Mastin v. Escott* (d). In all these cases, it is contended, the statute or canon, on which the proceedings were founded, was set forth, in some in the citation or decree, in others in the Articles. With respect to some of these cases, undoubtedly this was so. In the case of *The King's Proctor v. Stone*, the proceeding was against a clergyman, for affirming and maintaining doctrines contrary to the articles of religion, as by law established; the citation set forth the particular statute (13 Eliz. c. 12), which constituted this an offence, and prescribed a particular penalty for it, namely, deprivation. In that case, therefore, where the offence was heresy, and where a particular statute, giving a particular penalty for that offence, was intended to be relied on, the particular statute was set forth. *Newberry v. Goodwin* is not, when looked into, founded solely on the 5th & 6th Edw. 6th.—the statute against brawling, but founded also on the general Ecclesiastical Law; it was a proceeding with a double aspect, under the general law Ecclesiastical, and also under that statute, which prescribes a particular punishment for the offence, namely, suspension for a definite period. The statute of Edw. 6th was passed with the view of assisting the Ecclesiastical jurisdiction in the prevention and punishment of the offence of brawling, and, according to that

(a) 1 Cons. 424.

(b) 1 Phill. 282.

(c) 2 Cons. 138.

(d) 2 Curt. 692.

statute, a clergyman convicted of such offence might be suspended from the ministration of his office, therefore, inasmuch as the punishment prescribed by the statute was sought to be enforced, the statute was properly pleaded, but the promoter of the suit pleaded also the Canon and Ecclesiastical Law. *Cox v. Goodday*, was a proceeding against a clergyman, for brawling in church, by giving a certain admonition from the pulpit. I should, however, observe, that in that case, Lord Stowell said, "It was not absolutely necessary that the offence charged should come within the words of the statute. The statute was not absolutely necessary to found the jurisdiction of the Ecclesiastical Court, as it had undoubtedly a right to punish that offence independent of the statute." *Mastin v. Escott* was a proceeding under a particular canon for an offence, for which a particular punishment was imposed; the offence was the refusing to bury the child of a dissenter. These, then, are all cases in which a specific punishment was pointed out.

Now the objection taken in this case is not taken for the first time, it has been frequently taken in this Court, and as often overruled. The answer always given to the objection is, that where the general law Ecclesiastical is relied on it is not necessary to plead specifically; that where the offence is one generally cognizable in the Ecclesiastical Court it is not necessary to point out the particular canon or statute on which the proceedings are founded. This point was very fully discussed in the case of *Wilson v. M^cMath (a)*; perhaps it may not be un-

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(a) 3 Phill. 67.

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profitable to consider the law as there laid down by my learned predecessor in this Court. Now in that case, which was a proceeding by Articles against a parishioner for disturbing the incumbent of a parish in the exercise of his office, as chairman of a vestry it was contended, on behalf of the party proceeded against, that there was no Canon or constitution pointed out, but a general reference only made to the Canons and constitutions; the answer for the party proceeding was, that there is the unwritten as well as the written law, and that if this Court could not proceed without the authority of a Canon or constitution it would every day be exceeding jurisdiction; that in many points the ecclesiastical jurisdiction is exercised in the administration of the unwritten law, as in the power of ordinaries, and the jurisdiction over churchwardens and clerks. I have stated so much of the arguments of counsel in the case, in order that the expressions made use of by the Dean of the Arches may be perfectly intelligible, and as showing what was the objection, and what the determination of the Judge on it. Sir J. Nicholl said (a),—"There are two objections to the admissibility of these Articles,—1st, That the minister, as such, has no right to preside at a vestry meeting, and, consequently, the interrupting him in so doing is no disturbance; 2nd, that, even if it be a disturbance, this Court has no jurisdiction to repress or punish it as an offence. The case is said to be a new one so far as regards any express law, or any judicial decision on the subject. There is no statute, no Canon, no reported judgment, either

(a) 3 Phill. 78.

expressly affirming, or expressly negating the right. It nevertheless may exist as a part of the *Common Law of the land*, as a part of the *lex non scripta*, which is of binding authority, as much in the Ecclesiastical as in the Temporal Courts. Indeed the whole Canon Law rests for its authority in this country upon received usage; it is not binding here *proprio vigore*. Moreover this Court upon many points is governed, in the absence of express statute or Canon, by the *jus tacito et illiterato hominum consensu et moribus expressum*. It is true that generally the existence of this *jus non scriptum* is ascertained by reports of adjudged cases; but it may be proved by other means; it may be proved by public notoriety, or be deducible from principles and analogy, or be shown by legislative recognitions. Published reports of the decisions of Ecclesiastical Courts (with one very recent exception) do not exist; and if they did, yet the particular right in dispute may never have been so much as doubted or questioned before. And some countenance is given to that notion from the *general usage and practice* of the kingdom; for it is pleaded in the Articles, and on their admissibility must be taken as true, that the minister's presiding at vestry meetings is observed in and throughout the whole realm. The fact of such general usage for the minister so to preside is notorious, and has not been denied even in argument. Now such an usage (unless absurd or improper) I take to found a Common Law right. Law writers, particularly Mr. Justice Blackstone, lay it down, that general customs, which are the universal rule of the whole kingdom, form the Common Law, in its stricter and more usual signi-

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fication. Again, the first ground and chief corner stone of the laws of England is immemorial custom." Now, Sir *J. Nicholl* here affirms that the unwritten law of this Court is as much binding, as is the Common Law binding on the temporal Courts; and he goes on to illustrate this by reference to certain other causes of office, and he says,—“ It seems as much an offence of ecclesiastical jurisdiction as the erecting tombstones in a churchyard, or the pulling down tombstones, or breaking a door into a churchyard, or neglecting to repair a chancel, or setting up arms in the church, or forbidding the organ to be played when directed by the minister, or many other matters which are proceeded upon in these Courts, though there is no express canon or statute upon the particular subject. Yet in all cases of this sort the proceeding is in the Ecclesiastical Court, and in the form of Articles as for an offence, which mode of proceeding is in a great degree like an indictment at Common Law for a misdemeanor, where no statutory sanction is provided to enforce anything enjoined, or to restrain anything prohibited.”

Then he refers to certain cases of protest which have occurred in this Court, and in all of which the protests were overruled:—*Cade v. Newnham*, in 1786. *Leger and Hill v. The Dean and Chapter of Christ Church*, in the Peculiars, 1787. *Burton and Edwards v. Callcott*, in the Consistory, 1788. *Maudman v. Malpas*, Consistory, 1794. *Hutchins v. Denziloe*, Consistory, 1791—in all which cases the proceedings were by Articles for offences, under the general principles of Ecclesiastical Law, and not under any precise Canon or statute.

From all these cases it seems that the jurisdiction of the Ecclesiastical Court in matters ecclesiastical does not depend on any particular Canon or statute, but on the general Ecclesiastical Law, and on the universal consent by which some matters are exclusively of ecclesiastical and not of temporal cognizance. What is the general mode of proceeding in these matters? it is this—to plead the act of the 5 & 6 Edw. 6, c. 4, and then to plead the general law; it is not imperatively necessary to proceed under the statute, but you may proceed under the statute, or under the general law; and where both the statute and general law are pleaded or called in aid of the proceedings, if there is a failure of proof in the one case, as for instance proof by two witnesses, as required by the statute, proof by one witness, and circumstances will be sufficient under the general law; and in such case, although the Court cannot, under the statute, deprive a minister from his Ecclesiastical duties, he will still be liable to Ecclesiastical censures under the general law. There are several instances of such proceedings against clergymen for neglect of their duty. *Saunders v. Davis* (a) was a proceeding against a clergyman for irregularity of conduct. No particular Canon or statute was there pointed out, the Articles merely pleaded that, by the general law, clerks in holy orders are liable, for offences of this nature, to be deprived of their benefices, or suspended from the exercise of their clerical functions. *Dawe v. Williams* (b), in which case Articles were exhibited against a parishioner for brawling in church; and *Williams v. Goodyer* (c) are to the same effect.

(a) 1 Add. 291.

(b) 2 Add. 130.

(c) 2 Add. 63.

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It appears, therefore, from these cases, that unless it be the intention to proceed solely under a particular statute for a particular penalty pointed out by that statute, it is competent to plead the general Ecclesiastical Law, as contained in the Canons and constitutions. I have no doubt that in this case the law is sufficiently pleaded ; and the question, therefore, is, do these Articles contain that which amounts to an ecclesiastical offence ?

It has been urged by counsel on behalf of Mr. Head, that he labours under a great degree of hardship from not knowing what was the law to be urged against him ; but I scarcely think this can be pressed as a hardship. Mr. Head had ample opportunity of ascertaining this by opposing the admission of the Articles. I have said that I am of opinion that Mr. Head, or his counsel, were not bound to take any objection to the Articles in the first instance, and that he is entitled to all the benefit, as far as the law avails him, of this being a proceeding under the general law, and not under a particular statute.

This proceeding, under the general law, is against Mr. Head, a clerk in holy orders, of the united church, a beneficed clergyman actually holding a benefice. Under the general Ecclesiastical Law the Ordinary has power over all the clergy of his diocese ; beyond all doubt, he has the power of correcting the manners and excesses of his clergy, and for such a purpose, of proceeding against any individual in the Ecclesiastical Court, and, if it becomes necessary to proceed against a clergyman in these Courts, it must be done by Articles. It is not necessary here to state more as to the power of the Ordinary over the clergy of his diocese, and more

Particularly is it unnecessary when the charge in question has reference to a violation of the Liturgy, of Book of Common Prayer. The present case being one of this description, a proceeding by the Ordinary against a clergyman of his diocese, it becomes necessary to consider in what the charge consists. It is impossible to read the charge contained in these Articles without seeing, that if proved, an offence has been committed in direct violation of the Book of Common Prayer, as established by the Act of Uniformity; neither of Mr. Head's counsel have controverted this, indeed it is due to them to say that they would not argue this part of the case.

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Does then the letter of Mr. Head contain that which, in the charge, is alleged to be in derogation and depraving of the Book of Common Prayer, the Order of baptism, and of confirmation, and containing erroneous and strange doctrine?

Now this letter I have read over more than once, it is, as I have before stated, entitled—"A View of the Duplicity of the present System of Episcopal Ministration, in a Letter, addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation. By Henry Erskine Head, A.M., Rector of Feniton, Devon,"—therefore, this is a letter avowedly occasioned by a circular letter addressed by the Bishop of Exeter to the clergy of his diocese. Now the first part of this letter may be termed introductory,—and I would here observe that it is no part of the province of this Court to determine whether the Book of Common Prayer does contain erroneous doctrine; it is sufficient for this Court that it is the book which is

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to be used by the clergy as prescribed by the law of the land ; the question is, are the words used in Mr. Head's letter derogatory and in depravation of the book ? Now the fourth paragraph of this letter is as follows :—

“ It becomes my duty to state to you that I have received a letter (a printed circular), from the Bishop of Exeter, requesting me to give notice of his Lordship's intention to confirm such young persons of this parish as shall be duly prepared. In short, I am called upon to address you on the subject of confirmation—an equivocal word, pregnant with that necessary evil—controversy. Three years ago the children of this parish did attend the confirmation, on that occasion the exclusive object of Episcopal inquiry was — Have these children been instructed in the sacramental parts of the Catechism ? A negative reply was given ; and the rector of the parish was publicly censured for having omitted to teach the erroneous and strange doctrine which the Catechism contains.”

Now, to go no further than this passage, here is a distinct averment, that the Catechism does contain strange and erroneous doctrine, and this letter is avowedly written by Mr. Head, in consequence of a letter addressed to him by the bishop, acquainting him of the bishop's intention to confirm the young persons in Mr. Head's parish. This letter is published, as it openly declares, in consequence of the bishop's circular letter ; does it, or does it not, contain an offence for which Mr. Head is amenable in this Court ? Now, part of the duty which every clergyman is called on to perform at the time of institution, is found in the 61st Canon,

by which it is prescribed, "That it is the duty of every minister that hath the cure and charge of souls to prepare children for confirmation at such time as the bishop shall give notice of his intention to confirm young persons." Mr. Head goes on in his letter:—"There spake the spirit of the present system of episcopal ministration! All the bishops, it is true, may not be quite so incautious as the Bishop of Exeter, but, inasmuch as they connive at and continue the use of the Catechism, and Baptismal and Confirmation Services, in their present state, I do not hesitate to aver, that they act upon a system, by which the episcopal order is exalted under false pretences, and at the expense of the doctrines of the Bible."

Surely, nothing can be more offensive than this letter, addressed to parishioners, reflecting on the conduct of their bishop. Be it remembered, the charge is, that Mr. Head has affirmed, that the Catechism contains strange and erroneous doctrines. To proceed with the letter:—

"As a renunciation of the errors contained in these services perfectly consists with a true anxiety on my part to administer all the instruction or help, in my power, to such young persons of the parish, as are desirous of being *really* confirmed in the principles of the Christian faith, I request them to come to the rectory house every Wednesday, at four in the afternoon, during the remainder of the summer for this purpose. When the land of Egypt was wasted with lice and locusts, Pharaoh's magicians displayed their power, not by removing, but by increasing them; in like manner, some of the predecessors of the bishop of Exeter, instead

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of relieving their clergy from the errors of the Baptismal Service, required them to read in the Churches an additional document in recommendation of them."

Here, the letter openly speaks of the "errors of the Baptismal Service;" it is equivalent to saying that the Baptismal Service contains erroneous and strange doctrine. (Reads).

"His Lordship goes on, very courteously, to treat us, among other things, to charge the people of our parishes, to read over repeatedly and carefully in their Prayer Books the Office of Confirmation: these entreaties (it is fair to admit) made in a tone of great urbanity, the letter contains some just observations, and the whole announcement would be quite unexceptionable, if the Church services, to which his Lordship refers both you and myself, were free from error; but the letter covertly insinuates, that these Church services contain nothing but sound doctrine; indeed the whole communication is almost entirely founded on this assumption, which assumption is not consistent with truth. I do not mean that his Lordship intends to insinuate a greater proportion of falsehood than is usually found in episcopal circulars; far be it from me to attribute a single grain of duplicity to the Bishop of Exeter, who does not attach itself to all his right reverend brethren. All their Lordships promise at the ordination,—to be ready to banish and drive away all erroneous and strange doctrine;—but, on the other hand, they do not scruple to vex us with erroneous and strange doctrine of the Confirmation Service."

"This duplicity is not the less duplicity because it is undetected by the parties practising it. 'Deceivers do not cease to be deceivers because they are themselves deceived.'—2 Timothy, iii. 13."

"The only plea which can shield our prelates from the charge of intentional duplicity, is, that they really are not aware of the unscripturalness and mischievousness of those dogmas with which they encumber themselves and us. Ignorance of Scripture is that, which is to be attributed to their Lordships on a principle of mere charity. Hence their unreadiness to do that which they promise to be ready to do; hence their unwillingness to reform, or, (at least so far as their own ministrations are concerned,) to rectify or avoid the serious error which the Confirmation Service contains. Hence their reckless, ruthless, and inconsistent recommendations, to the public and to the clergy, of doctrine which is erroneous, strange, and contrary to God's word. The episcopal circular, which I have now received, is a clear specimen of a system of duplicity by which their Lordships, the Bishops, have long been deceived, and are now perhaps more extensively than ever deceiving the people."

"As reformation in this respect is not impossible, and as I am all pledged by my official vows, as a minister of the Church of England, to uphold and drive every erroneous doctrine, I do hereby declare and refuse to give any countenance whatever to the Office of Confirmation as it is now used by their Lordships, the Bishops, and Clergy of the Church, in compliance with the episcopal circular the contents and tenor of which, according

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to the young persons of this parish, I warn the all, young, old, and middle aged, to beware, in the name of God, of the erroneous and strange doctrine which it contains."

"It will be said, that for this, I deserve to be turned out of the Church; are all clergymen then to be turned out of the ministry who dissent from certain points in the Prayer Book? In this case every body will be turned out of the ministry, and then nobody will remain in the ministry; shall we leave the works of any churchman within the last four centuries, and I will undertake to convict him of inconsistency with the Prayer Book. It is a fact, that there is no bishop or clergyman in England, in Ireland, or in the Colonies who does not sin against the Prayer Book in one point or another. It is also a fact that the Prayer Book sins against itself; some parts of it are at variance with other parts; the fourth, sixth, eighth, and thirty-sixth Canons are repugnant to the first and third ordination vows. Some of the dogmas in the Catechism, Confirmation and Baptismal Services are utterly inconsistent with the doctrines contained in the eleventh, twelfth, thirteenth and seventeenth Articles."

Much follows which it may be unnecessary for the Court to read, but I am unwilling to keep back any part of this letter, which may explain or qualify anything which I have before read.

"The spirit of the Canons is to the first ordination vow what a drag-chain is to a coach, or what a large lump of lead would be to a balloon, it seeks to deprive me of that freedom of thought, speech,

inquiry, and discussion, which is conceded to me **at** my ordination; as an impudent highwayman **stops** me on my road, and robs me of my money."

"This is a figurative view of the case, but the **truth** is, that there are two sets of principles in the **P**ayer Book, so that he, who can obey both, must **be** a bifrons, inasmuch as our prelates administer **the** first ordination vow, they exhibit to the public **the** pledge and profession of Protestantism, inas-
much as they exact from every clergyman whom **they** ordain, subscription to the three articles in **the** thirty-sixth Canon, they cherish withal the **vital** principles of that popery of which they would **be** thought opponents, and, though they may be **(as** in charity it is to be supposed they are) un-
aware of the deep hypocrisy of this two-faced **system** of episcopal ministration, the effects of it **are** not the less deplorable to the nation, and, **humanly** speaking, to religion. Falsehood is thus **effectually** and most invidiously mixed up, under **pretence** of Protestantism, with the doctrines of **Scripture**; the errors of the Prayer Book, ratified **and** enforced by prelatical lordliness, lay like lead **on** the consciences of the clergy, and the unsus-
pecting candidate for ministerial honours pledges **himself** unawares to the bishop to make and not to **make** the Bible his paramount guide."

What sort of a proceeding would it be, to say to a clergyman, who takes umbrage at some points in the Prayer Book, if he should happen to have Scripture on his side,—withdraw from the Church, and leave us to teach error unmolested by your remonstrances. To raise an outcry against such a clergyman with a '*mos pro lege*,' that schoolboy

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defence of ancient absurdity, is a mere evasion of the point at issue, an excuse for hindering the progress of reform, and for hushing up such inquiries as these."

"Is it right that error should be taught in the Church establishment, by the authority of the bishops, under pretence of religion, and enforced by the same parties in Parliament, under an unjustifiable system of rigorous subscription? Is it right, that bishops should be suffered to retain their seats in the House of Lords? Have they done any good in Church or State as peers of Parliament? Have they not thereby done a great deal of evil? Is there any sanction for bishops being lords of Parliament, except that of ancient custom; and may not this be pleaded for the continuance of any absurdity, abuse, or profanation that has ever stained the annals of the human race?"

"What sort of confirmation is to be expected from men, who are utter strangers to thousands, and tens of thousands of those whom they confirm who, in the character of ministers of religion connive at and give support to error in the Church and who, in the character of peers of the realm refuse all reformation of those unholy laws from whence this error derives much of its malignity? Of whom or of what are they bishops? Of whom or of what are they overseers? Why are they exalted in Parliament, and why are they exalted at all?"

"If their Lordships wish to satisfy the public that their exaltation is just and right, let their Lordships, instead of teaching the erroneous doctrine in the Church services, banish and drive it away, instead

of binding the Bible to the obliquities of the Prayer Book, let them make, or endeavour to make, this Prayer Book consistent with the Bible, and with itself; instead of reversing the apostolic rule, let them alter that which is evil in the Prayer Book, and cleave to that which is good."

This is the whole of the letter, and with the exception of the introductory passage, a letter of which Mr. Head openly avows himself the author and publisher; it is impossible to conceive a document more offensive in style, particularly, considering the person by whom it is written, and the person to whom it is addressed.

The objection to this letter is, that it contains averments and positions in derogation and depraving of the Book of Common Prayer, the sacrament of baptism, and the rite of confirmation; that it does contain such averments is beyond all doubt. The cognizance of an offence of this nature is a matter which, beyond all doubt, under the present circumstances, belongs to the Ecclesiastical Court. It is an offence as grave and as serious as can be committed by a clergyman of the Church of England, who is bound at his ordination to subscribe to certain articles, without which subscription he cannot be admitted into the ministry of the Church. The 36th Canon prescribes:

"No person shall hereafter be received into the ministry, nor either by institution or collation admitted to any ecclesiastical living, nor suffered to preach, to catechise, or to be a lecturer or reader in divinity, except he be licensed either by the archbishop, or by the bishop of the diocese; and except he shall first subscribe to these three articles

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following, in such manner and sort as we have her appointed." The first article relates to the supremacy of the Sovereign. The second is :

"That the Book of Common Prayer, and ordering of bishops, priests, and deacons, containeth in it nothing contrary to the word of God, and that it may lawfully so be used ; and that he himself will use the form in the said book prescribed in public prayer, and administration of the sacraments, and none other." "Third, that he alloweth the Thirty-nine Articles to be agreeable to the word of God." The conclusion of the Canon is :

"To these three articles whosoever will subscribe he shall, for the avoiding of all ambiguities, subscribe in this order and form of words, setting down both his Christian and surname, *viz.*, *I, N. N. d* willingly and *ex animo subscribe to these three articles above mentioned, and to all things that are contained in them.*"

This, then, is required by every person before he can be received into the Church, that he make the declaration and acknowledgment.

It has been observed in argument, that the Canon, one of the Canons of 1603, does not apply the Book of Common Prayer as now in use, but the Book of Common Prayer then used, and that the Canon referred to the first book, so to term of Common Prayer, and a new or second book having been substituted for the first, Mr. Head is not within the provisions of the Canon. It must however, be recollected, that the statute 13 & 14 Car. 2, c. 4, s. 24, provides,

"That the several good laws and statutes of this realm, which have formerly been made, and are

now in force for the uniformity of prayer and administration of the sacraments, within the realm of England and places aforesaid, shall stand in full force and strength, to all intents and purposes whatsoever, for the establishing and confirming of the said book, intituled 'The Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches, and the Form or Manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons,' hereinbefore mentioned to be joined and annexed to this Act; and shall be applied, practised and put in use, for the punishing of all offences contrary to the said laws with relation to the said book and no other."

This statute, therefore, extends the laws and statutes in force and existence at that time to the Book of Common Prayer as established by that Act; all such laws as did apply to the Book of Common Prayer then or before in use, are to stand in full force and strength with respect to the form of prayer as established by the Act of Uniformity. All ecclesiastical offences, theretofore punishable by the Ecclesiastical Court, I take to be made punishable in like manner by the new law; therefore, I am clearly of opinion, that Mr. Head cannot shelter himself under the plea, that the Canons of 1603 refer to a Book of Common Prayer different from the one now in use. The 61st Canon prescribes that,

"Every minister that hath cure and charge of souls, for the better accomplishing of the orders prescribed in the Book of Common Prayer concern-

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ing confirmation, shall take especial care that no shall be presented to the bishop for him to lay hands upon, but such as can render an account their faith, according to the Catechism in the book contained."

The 13 & 14 Car. 2, s. 2, requires every minister or spiritual person to subscribe to certain articles, of which is,

"I, A. B. do declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book, intituled 'The Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church according to the use of the Church of England And by section 6, it is enacted,

"That every person who shall hereafter be presented or collated, or put into any ecclesiastical benefice or promotion within this realm of England shall in the church, chapel, or place of public worship belonging to his said benefice or promotion within two months next after that he shall be in the actual possession of the said ecclesiastical benefice or promotion, upon some Lord's day, openly, publicly, and solemnly read the morning and evening prayers, appointed to be read by and according to the said Book of Common Prayer, at the time thereby appointed, and after such reading there shall openly and publicly, before the congregation there assembled, declare his unfeigned assent and consent to the use of all things therein contained and prescribed, according to the form before appointed."

It is quite clear that the law imposes this on ministers for the prevention of schism in the Church

every person taking possession of a living must conform to this; can it then be contended that a clergyman can publish any doctrine he may think fit against the Liturgy, or Book of Common Prayer? if so, it is, as it seems to me, a monstrous proposition.

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The argument on behalf of Mr. Head has partly proceeded on the erroneous notion, that this is a proceeding under the Act of Elizabeth, and, therefore, that it is necessary to bring the case within that Act before the Court can pronounce Mr. Head liable to punishment. It has been contended, on this supposition, that Mr. Head has not transgressed the 4th section of the Act, which declares,

“That if any manner of parson, vicar, or other whatsoever minister shall *preach, declare, or speak* anything in derogation or depraving of the Book of Common Prayer, or anything therein contained, or any part thereof, and shall be thereof lawfully convicted,” &c.

I apprehend this argument to be founded on an erroneous view of the present proceeding; this is not a proceeding under that statute, but on the general Ecclesiastical Law, by which every clergyman is bound to conform to the Book of Prayer ordained by authority of the statute 13 & 14 Car. 2. Supposing this proceeding had been simply confined to the statute of Elizabeth, as was supposed to be the case, and as argued on behalf of Mr. Head, then the very learned argument of Dr. *Harding* might have been deserving of consideration, namely, whether an ecclesiastical person publishing certain doctrines in a newspaper is within the prohibition of that statute; whether “publishing” is a “declar-

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ing" within the words of the Act? it is not "preaching," and it is not "speaking;" then is it "declaring?" It is argued, that by the juxtaposition of the words in the section, the "declaring" must be a declaring by word of mouth, and that argument has been supported by referring to the language of several Acts of Parliament, said to be *in pari materia*:—all this, as I have said, might be deserving of consideration, if this proceeding was founded on the law derived from that statute alone; but that is not the case, it is founded on the general Ecclesiastical Law, assisted to a certain extent by the statutes of Elizabeth and Charles 2. I shall not enter into the discussion of that question; I view this as a question depending on the general law Ecclesiastical, and I consider the strict interpretation of the word "declare" is not necessary for the maintenance of this suit. The words of the charge are, "openly affirming and maintaining positions in derogation and depraving of the Book of Common Prayer, contrary to the laws, statutes, constitutions and Canons Ecclesiastical of the realm and against the peace and unity of the Church. Therefore, I shall decline to enter into the consideration of the statute, or whether the word "declare" does or does not mean "publishing by writing" although I think it may fairly be considered coming within the terms of that statute. The question, as it appears to me, depends on the general law, and it is only necessary to consider the case at that point of view. Can it be contended that the Ecclesiastical Court of the Ordinary has power over the clergy of the diocese, with respect to their general conduct and conversation, but not over th

doctrines they preach, or the observance of the Liturgy? Can it be contended that such was the law before the Act of Uniformity?

One case has been referred to in the course of the argument, a case generally known as *Caudrey's case*.^(a) That was a proceeding against a clergyman, for preaching against, as well as declining to use the Book of Common Prayer;—so far I admit that case is materially distinguishable from the present; it was for preaching against the Book of Common Prayer, and refusing to use it in celebrating Divine Service. The case was cited from Rolle's Abridgment, but, as it is very important to have the real statement of the facts, I have looked into the report itself. It was a proceeding arising from a special verdict, in an action of trespass. Caudrey had been deprived of his benefice, for preaching against, and declining to use the Book of Common Prayer; an action was afterwards brought by him against his successor in the rectory, of North Luffenham, in the county of Rutland, for breaking of a close appurtenant to the rectory. A special verdict was given in the action, finding the statute, and the other circumstances, and concluding, that if the party had been rightly deprived, the verdict was to be for the defendant, if illegally deprived, then for the plaintiff. On that question the case arose in the King's Bench, and there was a great deal of argument on it, it turned on the power of the Lord High Commissioners to deprive a clergyman on a first proceeding. It was contended, that this was an offence which came particularly under the statute of Elizabeth, and that the Lords had exceeded

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the power given to them, as in a case of the first offence, that there being no former instance, the lords had exceeded their jurisdiction, by depriving Caudrey, in the first instance. A great deal of the argument turned on that question, as did the principal decision of the Court; there were several other objections urged against the power of the Court, and relating to the qualification of some of the High Commissioners to sit in that Court. The resolution of the Court of King's Bench is in the following words, "as to the first and second objections, being grounded upon the said Act of Parliament, it was resolved, by the whole Court, that, notwithstanding these two objections, the sentence was to be impeached for either of them, and that on three causes: first, for that the said Act, concerning the uniformity of Common Prayer, being in affirmative, doth not abrogate or take away the jurisdiction Ecclesiastical, unless words in the negative had been added, as, "and not otherwise"; "in no other manner or form;" or to the like effect. And this appeareth by the general rule of all our books. The Ecclesiastical law, and the temporal law have several proceedings, and to several ends. The one, being temporal, to inflict punishment upon the body, lands, or goods; the other, being spiritual, *pro salute animæ*. Then both these distinct and several jurisdictions consist and stand well together, and do join in this; to have the whole man inwardly and outwardly reformed. The proviso in the Act doth make this question without question, for by it it is provided, ordained, and enacted, by the authority aforesaid, "that all and singular, archbishops and bishops, and their chan-

cellors, commissaries, archdeacons, and other ordinaries, having any peculiar Ecclesiastical jurisdiction, should have full power and authority, by virtue of that Act, as well to inquire in their visitations, synods, and elsewhere within their jurisdiction, as at any other time and place, to take accusations and informations of all and every the things above mentioned, done, committed, or perpetrated, within the limits of their jurisdiction and authority, and to punish the same by admonition, excommunication, sequestration, or deprivation, and other censures and process, in like form as heretofore had been used in like cases, by the Queen's Ecclesiastical laws; as by the said Act appeareth. So, as seeing if that Act had never inflicted any punishment for depraving, or not observing the Book of Common Prayer, and the unity and peace of the Church, the Ecclesiastical judge may deprive such parson, vicar, &c., as shall deprave, or not observe the said book, as well for the first offence, as he might have done by the censures of the Church, and the Ecclesiastical laws, as if no form of punishment had been inflicted by that act."—Then the Court goes on to consider the objection to the jurisdiction of the high-commissioners.

Here is a direct and positive recognition of the power of the Ecclesiastical Court to punish, by Ecclesiastical censures, or by deprivation, any person offending against the unity of the Church. There is, as has been shown, in the Act of Elizabeth, a direct recognition or preservation of the power of the Ecclesiastical Court; and, by the subsequent Act of the 13th & 14th Car. 2, there is also a regu-

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lar recognition of the power and authority of the Ecclesiastical Court, for the preservation of the peace, and unity of the Church,

Can the Court, then, for one moment, doubt that Mr. Head is within the jurisdiction of this Court, and amenable to his diocesan for disobedience to his ordination vow, as also that he is punishable for such disobedience by ecclesiastical censures; can the power of the Court to suspend Mr. Head be doubted? I have no doubt whatever, either as to the jurisdiction of this Court, or that Mr. Head has brought himself within the jurisdiction: indeed I feel no doubt that Mr. Head is clearly within the provisions of the statute of Elizabeth; but, under the general Ecclesiastical Law, Mr. Head is punishable for publishing this letter, of which he openly avows himself the author.

I therefore have no hesitation in pronouncing the Articles proved; the remaining question is what is the punishment the Court shall pronounce against Mr. Head, a minister in holy orders, and a beneficed clergyman. Now, I have referred to one part of the statute of Charles 2, (sec. 6), by which Mr. Head, when he took possession of his living, must, within two months, have read the morning and evening prayers, appointed to be read by, and according to the said Book of Common Prayer, and openly and publicly declared his unfeigned assent and consent to the use of all things therein contained; or, *ipso facto*, have been deprived of his said ecclesiastical benefice and promotion: I have also referred to the 36th Canon, relating to the subscription, to be made by such as are to be made ministers. This is absolutely necessary to be done

by every candidate for holy orders, to subscribe before he can be admitted into the ministry, or obtain possession of a living.

I therefore think Mr. Head has incurred the extreme sentence of this Court, and that the Court would be justified in pronouncing against him a sentence of deprivation. If Mr. Head could not have obtained possession of his living, without assenting or consenting to the use of all things contained in the Book of Common Prayer, he cannot complain if, by the sentence of this Court, he is placed in precisely the same situation as if he had not, within two months, conformed to the provisions of the statute, and if he had not done so, he would *ipso facto* have been deprived; it would not, therefore, as I have before said, be a very harsh exercise of the power of the Court to impose that penalty on Mr. Head, to which he was liable, if he had not made the declaration of conformity, according to the statute. The Court, however, is not disposed to go to the full extent of its power; not from anything that exists in extenuation of Mr. Head's offence, for nothing can be more offensive than the way in which he has expressed himself in his letter; but the statute of Elizabeth makes a difference between a first and second offence: by it, "any person preaching, declaring, or speaking against the prescribed rites and solemnities is liable, for the first offence, to forfeit for one year the profits of all his Ecclesiastical benefices, and also to be imprisoned for six months: for a second offence, he is to lose or be deprived *ipso facto* of all spiritual promotions, and to be imprisoned during life." It seems, therefore, that, although it was considered, at the time

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the statute was passed, that the offence would not bear much extenuation, still that it was right and proper that the statute should make a distinction between persons guilty of one offence, and guilty the like offence a second time. I think, therefore, that the justice of the case may be satisfied by suspending Mr. Head from his living, and from the emoluments of it, for three years. It will be borne in mind, that Mr. Head may be proceeded against for a second offence, if he shall, during the term of his suspension, publish the like doctrines.

I am, therefore, of opinion to pronounce the Articles given in to be fully proved, and to decree that Mr. Head, for the offence he has committed, be suspended from his office, and ministration, for the term of three years; and that he be condemned in the costs of the suit; with an admonition to him to abstain from such conduct in future.

I think the Court would have been quite justified in going to the fullest extent of punishment, looking to the language in which Mr. Head has expressed his opinions in his letter.

Third Session.

Trinity Term,
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The Judge pronounced the articles and exhibits thereto annexed, given in and admitted in this cause on the part and behalf of Ralph Sanders, against the Rev. Henry Erskine Head, Clerk, the party proceeded against in this cause, to be sufficiently proved, and that the said Rev. Henry Erskine Head had offended against the laws, statutes, constitutions, and Canons Ecclesiastical of this realm, and that he be suspended for the space of three years from the time of publishing the suspension for that purpose, in the parish of Feniton aforesaid, from all discharge

and function of his clerical offices, and the execution thereof, that is to say, from preaching the word of God, and administering the sacraments and celebrating all other duties and offices in the said parish church, and elsewhere within the province of Canterbury, and from receiving any of the profits and benefits of the said rectory and benefice, and from receiving and taking the rents, fruits, tithes, profits, salaries, and other Ecclesiastical dues, profits, and emoluments whatsoever, belonging and appertaining to the said rectory and benefice; and did suspend the said Rev. Henry Erskine Head accordingly, *and did condemn him in the costs of this suit*, and the Judge did moreover direct that a copy of this decree, duly certified, be transmitted to the Consistory Court of Exeter, in order that a sequestration may be there issued, and did direct the suspension to be published in the said parish of Feniton, on Sunday the 25th of June.

The taxation of costs having been proceeded with the registrar allowed to Mr. Sanders the costs occasioned by the protest (*a*) whereupon a notice was served on the proctor for Mr. Sanders, by the proctor of Mr. Head, to the following effect:—"I beg to give you notice that it is my intention to move the Court to direct the minute of Court, dated third session of Trinity Term last to be altered, so as to explain what costs Mr. Head is to be condemned in."

The *Queen's Advocate* and *Harding* moved accordingly.

Addams and *Robinson* appeared for the promoters of the suit.

(*a*) See *ante*, p. 49.

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When the Court on a former occasion overruled the protest made on behalf of Mr. Head, an application was made to the Court to allow of an appeal from its decision to the Judicial Committee of the Privy Council. The Court allowed the appeal; it was prosecuted; the Judicial Committee, after some doubt, affirmed the sentence of this Court, and remitted the cause. The Court did not, in the first instance, condemn Mr. Head in the costs occasioned on the argument of the protest, and for this reason until the articles were given in, the Court could not know the exact nature of the charge against Mr. Head; it is true the citation gave a very full specification of what was the nature of the charge, but until articles are admitted, the Court cannot adjudicate on a case; it might possibly happen that the charge contained in the citation might fail to be established on the articles, and, therefore, the Court did not proceed at once to condemn Mr. Head in the costs. Now the case has been heard, the Court was of opinion that the articles were fully proved, it decreed Mr. Head to be suspended for three years and condemned him in the costs, that is, the cost *generally* of the suit, including those occasioned by the protest. It is said this is a hard measure on Mr. Head, that the appellate Court gave no cost of the appeal to that Court; but why is Mr. Sanders to pay his own costs, occasioned by Mr. Head appearing under protest. I refuse this motion, but I do not condemn Mr. Head in the costs of the motion.

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PREROGATIVE COURT OF CANTERBURY.

KEIGWIN v. KEIGWIN.

1843.

July 12th.

This was a business of proving, in form of law, the last will and testament of Elizabeth Keigwin, who died on the 9th of April, 1842, leaving a brother, a sister, a nephew, and two nieces.

A party shewed a paper to two persons present at the same time, and requested them to sign it; both persons observed the signature of the party affixed to the paper; and both subscribed it in her presence. This paper, being a will, held to have been duly executed. Alterations on the face of a duly executed will, held, upon the circumstances, to have been made before execution.

The will in question, was dated the 11th of December, 1839, it was signed by the deceased, and subscribed by two persons as witnesses, but there was no attestation clause: there were certain alterations on the face of the will: by it, the brother was appointed sole executor.

The subscribing witnesses having, in accordance with the practice in the registry of this Court, where there is no formal attestation clause, been applied to to make affidavit of the due execution of the will: the facts, as stated by them, were of such a nature that probate could not be granted in common form; the paper was accordingly propounded, by Mr. Keigwin the brother and executor, in an allegation; which pleaded,—First, that the deceased gave instructions for the drawing up of her will to Mr. F. Hichens, a friend, whom she was in the habit of consulting on her affairs. That pursuant thereto the will in question was drawn up by Mr. Hichens, and was delivered to the deceased a few days prior to the 11th of December, 1839; that the last mentioned date was inserted in the said will by the desire of the deceased; who stated to

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Mr. Hichens, as her reason for so desiring, that should have some carpenters at work in her house on that day, and that they could attest the execution thereof.

Second, pleaded, that the deceased after the will had been so delivered to her, and previous to execution thereof, spoke to Mr. Hichens respecting the same; and he, by her direction, made certain alterations therein [these were specified.] After having made such alterations, Mr. Hichens left the said will with the deceased, telling her to put her name or initials in the margin opposite the alterations.

Third, pleaded, that the deceased set and subscribed her name at the foot of the said will on 11th of December, 1839, and her initials opposite certain of the said alterations.

Fourth, pleaded, that on the 11th of December 1839, on which day the deceased had previously appointed two persons to come to her house, to do some carpenter's work, she came into the room in which such two persons were at work, she having a pen and inkstand in her hands, and then and there produced her said will, signed by her, to the two persons, and desired them to attest the same, saying "I want you to sign your names to this paper." That, at her request, such two persons signed their names thereto, in her presence, and in the presence of each other. That, although the will was so folded as to conceal the contents thereof, the signature of the deceased, apparently fresh made, was plainly visible, and was seen by the two witnesses.

Mr. Hichens deposed to the following effect: "About two years before the death of the deceased

she produced to me a copy of a will of a relation of **hers**, under which she had derived some property, **and** requested me to prepare a similar will for her; **I** did so, and delivered the will I had so prepared to **her**. I recollect, that shortly after I had given the **will** to the deceased, she on one occasion spoke to **me** about it; I cannot call to my recollection **whether** it was then signed by her or not; I have tried **to** recollect this, but I cannot; my impression **certainly** is, that the said occasion was prior to the **execution** of the will, but I really cannot swear that **it** was so; I did not observe that the will had been **then** signed; she asked me to make some alterations **in** it [the witness here identified the alterations on the face of the will as those made by him on that occasion.] I made these alterations in her presence. I believe the deceased put her initials in the margin of the will opposite the alterations."

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The two subscribing witnesses deposed to the following effect; that they "are carpenters, and were at work in the house of the deceased on the 11th of December, 1839; that she on that day brought a paper into the room where they both were, having also in her hands a pen and inkstand; [they both identified the will propounded as the paper] that addressing them she said, 'I want you to sign this paper,' and pointed out the place where they were to sign; that the paper was so folded that they only saw the signature; that they have no doubt whatever as to the fact of the signature of the deceased being affixed to the paper at the time when they subscribed it; that they subscribed the paper in the presence of the deceased and of each other;

1843. they did not recollect whether the deceased pointed
 July 12th. out her signature to them as being her name; but
 KNOWN were both positive that she did not say anything in
 against particular about her handwriting.”
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The cause came on for hearing.

Addams in support of the will.

Robertson, contra.

JUDGMENT.

SIR HERBERT JENNER FUST.

The deceased in this case gave instructions to a gentleman named Hichens, or perhaps rather requested him, for he is not a professional man, to draw up a will for her, which accordingly he did; and, by her special desire, he inserted a date as a day, on which, as she stated, she intended to execute it.

Mr. Hichens states the transaction thus generally, that he prepared the will, and delivered it to the deceased; that she afterwards produced it to him for a particular purpose, but he cannot recollect whether it was then signed by her or not; he has tried to recollect this, but cannot; his impression is that the occasion on which this happened was prior to the date of the execution of the will; but he cannot swear that it was so. He says the deceased asked him on that occasion to make certain alterations and he did so in her presence. Now looking at those alterations, and the places in the will where they are made, and that Mr. Hichens was the person who made them, it seems scarcely possible, if the deceased had in fact signed the will at this time,

that her signature could have escaped the observation of this witness. Mr. Hichens further says, that he believes the deceased put her initials in the margin of the will opposite the alterations. Now this is the only witness who can speak to the facts on this point; and on his evidence the result, in my opinion, is, that at the time when these alterations were made the will was not signed by the deceased. The two other witnesses, the parties who attested the will, cannot speak as to these alterations. Their evidence is shortly this,—they were at work in a room in the deceased's house; she brought this paper into that room, and, addressing them both, said "I want you to sign this paper," and pointed out the place where they were to sign; they both observed her name signed thereto; they have no doubt whatever that the paper produced to them by the deceased had been signed by her; but they do not recollect that she pointed out the signature to them as being her name; they are sure she did not say anything in particular about her handwriting. The question comes to this, whether this will has been duly executed according to the requisites of the statute; the deceased did produce this paper, having her signature affixed to it at the time, to two witnesses present at the same time; and the two witnesses did attest it in her presence; was this a sufficient acknowledgment? I am clearly of opinion that it was; it is not necessary that the party should say in express terms "that is my signature;" it is sufficient if it clearly appears that the signature was existent on the will when she produced it to the witnesses, and was seen by the witnesses when they did, at her request, subscribe the

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will. On these circumstances, I hold that this paper has been sufficiently executed.

Then as to these alterations, I have said, I think there is sufficient evidence to enable the Court to hold that they were made *before* the will was executed.

I therefore decree probate of this paper with the alterations ; it is, however, a proper case for giving the costs out of the estate.

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PETT *against* HAKE.

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A testamentary paper (dated 1826) signed by a testator, having an attestation clause, but not subscribed by witnesses. The presumption of law against the final character of the paper held to be rebutted, and probate granted upon the evidence and circumstances.

WILLIAM HAKE died on the 4th of November 1842, leaving a brother his only next of kin. Upon the death of Mr. Hake three testamentary papers were produced.

Paper one. A will dated the 5th of December 1822, signed by the deceased, and attested by two witnesses ; by this paper a Doctor Samuel Pett, was appointed sole executor.

Paper two. A codicil, also dated the 5th December, 1822, signed by the deceased, and attested by three witnesses ; the purport of this paper was to devise a copyhold estate, at Gaywood, in the county of Norfolk, to Doctor Pett, upon trust, to sell the same, and to apply the proceeds thereof upon the trusts in the said will mentioned.

Paper three. A codicil, dated the 25th of December, 1826, signed by the testator, having an attestation clause but not subscribed by witnesses this paper was as follows :—

"Whereas, since the date and execution of my last will, Doctor Pett, whom I had therein named as my executor, has departed this life; now I do, by this codicil, appoint Samuel Pett and Francis Pett, sons of the said Doctor Pett, my executors in his stead. I hereby revoke the codicil to my will, bearing date the 22nd of December, 1822, whereby I have devised my copyhold estate to my said executor; and, in lieu thereof, I authorize and direct my executors, hereby named, to sell the same; and to stand possessed of the monies to arise from such sale upon the trusts declared by my said will."

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These three papers were propounded as containing together the will of the deceased, by Mr. Samuel Pett, the surviving executor, appointed by paper number three.

By the affidavit of scripts it appeared, that these papers were found enclosed and sealed up in an envelope, which envelope had formerly been in the possession of Mr. Francis Pett, and upon his death had, with other papers, come into the possession of Mr. Samuel Pett, as executor of his brother. A fourth paper was found enclosed in the same envelope; it purported to be a codicil to the will of the testator; it had the initials "W. H." written in pencil at the foot; there was an attestation clause with the letters "A. B.," "C. D.," "E. F.," written in pencil at the foot of the clause, in three separate lines, as denoting the place where witnesses were to subscribe. The purport of this paper was as follows:—

"Whereas Doctor Pett, the executor appointed by my last will, departed this life on the 1st of January, 1823; and whereas Joseph Eade, whom I by letter requested to act as my executor in lieu of

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Doctor Pett, deceased, hath also departed this life now I do, appoint Samuel Pett, of Hackney, Middlesex, and Francis Pett, of Hitchin, Hertfordshire sons of the said Doctor Pett, executors of my will I give and devise to them all my real and personal estate, upon the trusts I have before directed by my will and codicil, with regard to the property thereby bequeathed and devised. In witness, I have to this codicil set my hand and seal, this ———, 1830
[An attestation clause as stated above.]

In the year 1827, the deceased sold his copyhold estate and received the purchase money.

The witnesses examined in the cause, to whose testimony it is considered necessary to advert, were Mr. Joseph Dyson, Mr. Thomas Dyson, and Mr. Robinson.

The Messrs. Dyson deposed to the following effect

That the deceased frequently spoke to them of the Pett family as his cousins; that he spoke of Francis Pett as the lawyer; that he also spoke of his cousin, Mr. Eade, as the lawyer. That, two years before his death, he said, "the lawyer has made his will"; about one year and a half before his death he said his will and all his writings were at Samuel Pett's, the coal merchant. Mr. Joseph Dyson also deposed that the deceased said to him on one occasion, "Mr. Samuel Pett has just been here, and wish you had been here to see him; if anything happens to me, that's where my writings are; he is my sole executor. I put him in the place of the other two, the doctor and the lawyer."

Mr. Robinson deposed to the following effect:

That he attended the deceased, in the capacity of medical adviser, for about the six or seven last years of his life; that the deceased on one occasion told

him, "that Doctor Pett had had his will in his possession, when he was alive, but that since his death, his family had it in their care." That the deceased also told him, "that he had not altered his will, and did not intend to alter it; that it was still in the possession of the family;" that the deceased frequently told him, "that Mr. Samuel Pett was his executor, and if anything happened to him to send to Mr. Alfred Pett;" that the last time the deceased mentioned this circumstance was about a year before his death.

Mr. Thomas H. Hake opposed the admission of paper two to probate; he did not give in any opposing plea.

The cause came on for hearing.

Addams and *Blake* asked for probate of the will and second codicil (paper three). They submitted that the presumption of law against the second codicil, by reason of there being an attestation clause without witnesses, was sufficiently rebutted by the evidence; that if the Court should be of this opinion, then the first codicil (paper two) was revoked and useless; they offered to take probate of the first codicil also, in case the Court should so direct.

Jenner, contra.

The second codicil is not entitled to probate; it is admitted that there is a legal presumption against its validity requiring to be rebutted. The parol declarations are insufficient to establish this paper; the deceased spoke of a Samuel Pett not as his executor, but as a *sole* executor; he must then have referred to Doctor Samuel Pett, who was the sole executor of

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the will and first codicil. Mr. Samuel Pett never was a sole executor, he has indeed become so by the death of his brother; but all the declarations of the deceased refer to a sole executor. The declarations spoken to by the witnesses, particularly that wherein he speaks of Mr. Samuel Pett as "put in the room of the doctor and the lawyer," are only susceptible of a rational meaning, by supposing that the deceased subsequently to 1830, made some other testamentary paper, by which Mr. Samuel Pett was named as sole executor; no such paper is forthcoming; then the legal presumption is, that such paper was in the hands of the deceased, and was destroyed by him.

JUDGMENT.

SIR HERBERT JENNER FUST.

In this case the deceased is a Mr. William Hake, who died on the 4th of November, 1842, leaving Mr. Thomas Hake, his brother, his only next of kin and the sole party entitled to his personal estate,—in case he has died intestate; or entitled to such portion, if any, of his personal estate, as has not passed by his will.

Now it appears, that some years ago the deceased gave instructions to a solicitor to prepare a will for him, this was accordingly done, and such will duly executed, in December, 1822, by being signed by the deceased, in the presence of two witnesses.

On the same day, as it seems, the deceased made a codicil, whereby he directed a copyhold estate situate at a place called Gaywood, in the county of Norfolk, to be sold; this codicil was also signed by the deceased in the presence of, and was attested by three witnesses.

Subsequently to this a codicil was prepared for **the** deceased—how or by whom does not appear—but evidently, as the language shows, not with the **in** tention of revoking the trusts declared of the **pro**ceeds of the sale of the copyhold estate ; but simply **for** the purpose of bequeathing that estate to Mr. Samuel and Mr. Francis Pett, in order that they **m**ight sell the same, and to appoint them executors **of** the will, in the place of Doctor Pett, their father, **w**ho had died. To that codicil the deceased signed **h**is name ; there is a full attestation clause, but no **w**itnesses' names are subscribed to it, consequently, **there** is a presumption of law that the deceased **did** intend to execute that codicil in the presence of witnesses, in order to give effect to it ; and in **case** he should not do so, then it was not to stand ; **the** deceased having signed his name to this paper, **the** presumption is lessened, still, in law, there is a presumption against the instrument, and this requires to be rebutted by evidence or by circumstances.

The mode in which it is proposed to overcome or repel this presumption is, by showing that the deceased, after the date of the codicil, deposited it, with other papers, in the hands of Mr. Francis Pett, whom, with his brother, Mr. Samuel Pett, he had, by this very codicil, appointed executors in the room of Doctor Pett, their father, deceased ; that this paper remained in Mr. Francis Pett's possession until his death, when it came into the hands of Mr. Samuel Pett, who became his brother's legal representative, and who retained possession of it until the death of the testator, Mr. Hake.

Now it appears, that in the same envelope in

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which was found the will and the two codicils, which I have just mentioned, was contained another codicil, or intended codicil, which bears date in the year 1830, blanks being left for the month and for the day of the month. This last paper recited the death of Doctor Pett, and of a Mr. Eade, whom, it would seem, the deceased had at some time requested to act as his executor; and it then goes on to appoint the said Samuel Pett and Francis Pett, the sons of Doctor Pett, to be his executors, and gives and devises to them all the deceased's real and personal estate, upon the same trusts as directed by his will with regard to the property thereby bequeathed and devised. This last paper is found in the same envelope with the others; and having originally been in the possession of a person named as one of the executors, the probability is that some communication passed between the deceased and this person respecting it; but as to this point there is no evidence. It would seem that the deceased did intend to make a codicil of this description; and the similarity of this and the other codicil of 1826, throws some doubt as to which of the two codicils the declarations of the testator, spoken to by the witnesses, refer. The copyhold estate at Gaywood was sold in 1827, shortly after the date of the second codicil, and the testator received the purchase money for it. The two witnesses to the will were a Mr. Eade, a solicitor, and Mr. Cross, a clerk in Mr. Eade's office; these two persons are dead. The first codicil is attested by these two persons, and by a Mr. Pownall. The second codicil is signed by the testator; there is an attestation clause, but no witnesses; it simply appoints

new executors, with directions to sell the copyhold estate.

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The declarations of the deceased which are to repel the legal presumption against this instrument, are spoken to by the witnesses, Joseph Dyson, Thomas Dyson, and Mr. Robinson. I will take the circumstances stated by the latter first, as they seem to me the most important. He says, after stating that he attended the deceased, as his medical adviser, for the six or seven last years of his life, that the deceased told him, "that Doctor Pett had his will in his possession when he was alive, but since his death his family had it in their care."

I will here remark that no other testamentary papers of the deceased, besides those I have mentioned, have been found.

That the deceased also told him, "that he had not altered his will; that he did not intend to alter it; and that it was still in the possession of the family. That the deceased several times told him, "that Mr. Samuel Pett was his executor, and that, if anything happened to him, he was to send for Mr. Alfred Pett;" that the last time of the deceased mentioning these circumstances to the witness was about a year before his death.

The deceased, therefore, did allude to a will in existence at that time, and a will by which Mr. Samuel Pett was appointed an executor; that he referred to it as an existing and operative will. Now all the testamentary papers which have been found, and no others are suggested to be in existence, are, the will, the first codicil, the second codicil, and, what I will call, the draft codicil, dated 1830.

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To which of these papers must the deceased be taken to have referred in these declarations?

One of the papers is signed by him; the other is a mere draft signed,—if by the deceased, only with pencil initials;—I see no reason to doubt as to which paper was referred to. If Mr. Robinson is correct in deposing, that the deceased spoke of a will, of which Mr. Samuel Pett was the executor, it could not be the first will, or the first codicil, because, in neither of these is Mr. Samuel Pett named as an executor; then the deceased must refer to the second codicil, or to the draft codicil, or to some other paper not found, or not in existence. Now the two Dysons both state, that the deceased, about a year and a half before his death, said, “that his will, and all his writings, were at Samuel Pett’s here, then, is a declaration carried down to a late period in the life of the deceased, in which he speaks of his will and writings, in connexion with Mr. Samuel Pett; as being at Mr. Samuel Pett’s. Joseph Dyson deposes, that the deceased, on one occasion, said to him, “Mr. Samuel Pett has just been here; if anything happens to me, that’s where my writings are; he is my sole executor.” Now the last sentence of this declaration supports the argument against the second codicil, namely, the argument that the deceased must have referred to his first will and codicil, of which Doctor Samuel Pett was appointed sole executor;—but then this follows, “I put him in the place of the other two the doctor, and the lawyer.” It has been argued that if these words are to be relied on as effective words, the declaration must refer to some other paper made by the deceased, destroyed or not forth

coming, and for this reason :— Mr. Samuel Pett is not, by the second codicil, a sole executor, put in the room of two other executors, but a sole executor only in this sense, as become so by the death of Francis Pett ; and, consequently, that the declaration must have referred to some paper executed subsequently to the death of Mr. Francis Pett, by the deceased.

I think that to accede to this argument would be going beyond all the circumstances of the case.

If, in this case, it were shewn, that the deceased had actually executed some other paper, by which Mr. Samuel Pett was appointed a sole executor in the room of his father, and of his brother the lawyer, there would have been some ground for the argument, but the expression relied on is, “ I put him in the place of the other two, the doctor and the lawyer,” but the deceased also spoke of Mr. Eade as “ the lawyer :” however he certainly did speak of Mr. Samuel Pett as “ his sole executor ;” I cannot however think that the witnesses are to be pinned down to the nicest accuracy of expression.

Mr. T. Dyson swears that the deceased, at least so far back as ten years ago, frequently spoke of his will in connexion with the Pett family. The only testamentary papers, of which the Court has any trace, are the will, the first codicil, the second codicil, and the draft codicil of 1830.

Under these circumstances, I cannot but think, that the presumption against the legal validity of this paper, arising from its having an attestation clause without any witnesses—it is signed by the deceased, Mr. T. Dyson proves his handwriting—is sufficiently rebutted ; I think it is impossible not

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death of his father, the deceased returned to England to settle his affairs, and, for his assistance in this matter, was introduced by Mr. Wrench to Mr. Newstead, a solicitor, to whom he entrusted the necessary law arrangements. On the 16th of November, 1842, a meeting, by previous arrangement, took place at Messrs. Coutts's, the bankers of the deceased, at which were present, the deceased, Mr. Wrench, Mr. Newstead, Mr. Freshfield, the solicitor of the Globe Office, and Mr. Broderip, the family solicitor of the deceased, and a solicitor to the trustees of the will of Sir John Murray. Mr. Broderip, at this meeting, paid, on behalf of the trustees, to the deceased 10,862*l.*; and the deceased paid to Mr. Freshfield 4000*l.* and to Mr. Wrench 2412*l.*; and he further paid to Mr. Wrench 1000*l.*, in part consideration of an undertaking by Mr. Wrench to pay to the wife of the deceased an annuity of 150*l.* during the joint lives of herself and the deceased. The deceased also paid to Mr. Broderip a sum of 1500*l.* and assigned certain other property, to which he was entitled under his father's will, in order to provide for the future subsistence of his mother. Upon the termination of these several matters of business, Mr. Freshfield and Mr. Broderip quitted the room; and after their departure, the will proposed was signed by the deceased in the presence of Mr. Wrench, Mr. Newstead and a Mr. Goodban, a clerk of Messrs. Coutts's, who was called in for the purpose of attesting the will; the will was duly subscribed by Mr. Newstead and Mr. Goodban as witnesses.

Mr. Newstead, in his deposition, gave the fol-

lowing account of the preparation and execution of the will. He stated, that on an occasion during which he was transacting business with the deceased, the deceased incidentally mentioned, that he shortly should have occasion to trouble him (Mr. Newstead) to make his will for him ; but that the deceased did not state what was to be the purport of it. That on the 6th of November he received instructions for such a will at the conclusion of a letter written to him by Mr. Wrench, on the subject of Lady Murray's annuity. That wishing for some explanation as to the meaning of the word "cash" referred to in such letter, he asked Mr. Wrench to explain what was meant, and Mr. Wrench gave him the required explanation. That he also inquired whether the deceased intended to give anything to his own family ; and was told by Mr. Wrench that he did not intend to do so ; that the deceased said, "he had never received anything from them, and therefore he should give them nothing." He further stated, that on the 12th of November, he had an interview with the deceased, in order finally to settle the approaching arrangements for the 16th ; that on such occasion he did not mention the subject of the will to the deceased, neither did he read over the draft to him, or inquire whether his intentions remained unaltered ; that the deceased did on the 12th desire him to have the will ready by the 16th. In explanation, Mr. Newstead stated, that he thought it unnecessary to say anything on the subject of the will, as it was of so plain and simple a nature it could not be misunderstood. On the subject of the execution of the will, he deposed, that on Mr. Fresh-

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 July 14th. 16th, the deceased observed, that he had now ~~only~~
 to go to his (Newstead's) house to sign his wi ~~ll~~;
 WRENCH that he then told the deceased that he had the w ~~ill~~
 against in his pocket, and that it could be signed at once ~~de~~;
 MURRAY. that the deceased having assented, he proceeded ~~e~~
 to read the will over to him, Mr. Wrench being ~~present~~
 present; that the deceased appeared to attend to ~~it~~
 it, and made an observation on the description ~~of~~
 the residence of Miss Finch, inquiring whether i ~~i~~
 was not in "Berkshire," instead of "Buckingham ~~sh~~
 shire." That Mr. Goodban was then called in as ~~a~~
 a second witness, and the will duly signed and ~~att~~
 attested.

Mr. Goodban deposed, that by reference to his ~~signature~~
 signature, he was sure that the will was signed i ~~n~~
 his presence, and duly attested by himself an ~~d~~
 Newstead; that he could give no further account ~~of~~
 the transaction.

The *Queen's Advocate* and *Hurding* in support ~~of~~
 of the will.

Addams and *R. Phillimore*, contra, contend ~~e~~
 that the onus of proof cast on a party, a stran ~~ge~~
 by blood or connection to the testator, propounding ~~g~~
 a will, prepared from his instructions, and almos ~~t~~
 entirely for his exclusive benefit, to the total dis ~~her~~
 herison of the relations of the testator, was not
 satisfied by the evidence in the cause. *Butlin v.*
Barry (a), *Middleton v. Forbes* (b).

In reply, *Tuffnell v. Constable* (c) was cited.

(a) 1 Curt. 619.

(b) 1 Hagg. 397.

(c) 4 Hagg. 477, 481

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There are some circumstances in this case which are calculated to call for the vigilance and jealousy of the Court; still I do not, upon all the circumstances, feel myself able to say, that this is not the will of a capable testator; whether it is the will of a prudent man, or such a will as the deceased ought to have made, is quite another question.

The deceased, Sir J. P. Murray, Baronet, succeeded to his title but a short time before his death; his father died in May, 1842, Sir J. P. Murray in February, 1843. It appears that the deceased had a wife from whom he was separated, but for whom, under the terms of a deed of separation, he had bound himself to provide, by payment of an annuity of 150*l.* during their joint lives; he had a mother who, it seems, is a lunatic, and several brothers and sisters, who, judging from the testimony in the cause, are in slender circumstances.

The deceased seems to have been a person of very extravagant habits, and to have lived for some time previously to the death of his father on a sum of ready money, and an annuity of 30*l.* procured, by some rather intricate arrangements, from the Globe Insurance Office. Upon the death of his father, the deceased succeeded to an entailed family estate in Scotland, and he also became entitled, under the will of an uncle to certain reversionary property. Whilst the deceased was living on a narrow income, he obtained loans of money from Mr. Wrench, who is described as an optician and mathematical instrument maker, but who appears to be also engaged in other business, such as discounting bills; this is shewn by the evidence of

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the principal witness, Newstead, who deposes,—although he says, that he does not consider him to be what is generally called a money-lender,—that Wrench was in the habit of discounting bills for persons, and among others, for Sir J. P. Murray the deceased.

I will now proceed to consider the will in this case :—it is dated the 16th of November, 1842, the purport of it is to give all his plate, linen, china, wine, books, jewellery, money in the house, and all other property, that might be in and about his residence at the time of his decease, to a person named Ellen Finch, with whom the deceased was living at the time of his decease. All the real residue and remainder of his estate and effects, of whatever nature or kind soever, and wheresoever or over which he had a power of disposition, he gives to Mr. Wrench, whom he appoints sole executor.

Here is a will, made in favour of a person with whom the testator was in no way connected by ties of blood, in exclusion of those individuals whom he was bound by the natural ties of love and affection; they are entirely excluded from all participation in the estate of this deceased. It has been said, that the deceased's property is small, that he has been sworn under 6000*l.*, and that there are debts of large amount; and further, that the jewels and other articles given to E. Finch, are valued 500*l.*, in that calculation: but, independent of this, it appears, that on the same day on which the will was executed, the deceased executed a deed of assignment, prepared by Newstead, by which he secured to Mr. Wrench the payment of a sum

2800*l.*, charged on certain reversionary property, as a consideration for his taking upon himself the payment of the annuity of 150*l.*, payable to Lady Murray, during the joint lives of herself and Sir James; for which undertaking, Mr. Wrench also received a sum of 1000*l.* in ready money; and, as I understand it, this 2800*l.* was secured on reversionary property, in which the deceased had an absolute vested interest; not a mere contingent expectancy.

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This, therefore, is a case which, as I have said, calls for the attention and vigilance of the Court; particularly looking to the mode in which the will was prepared and executed. On the same day on which the will was executed, a great many transactions of business took place at the banking house of Messrs. Coutts, in the Strand; a sum of money was paid to the Globe Insurance Office, through Mr. Freshfield, their solicitor, and an assignment of certain reversionary property, executed by Sir J. P. Murray to that office; a sum of 1500*l.* was left in the hands of Mr. Broderip, for the purpose of being invested with other sums, the produce of Sir J. P. Murray's share of his father's property, which was assigned for the like purpose, to form a fund for the support of Sir J. P. Murray's mother. Now, the fact of Mr. Freshfield and Mr. Broderip being present on this occasion, and transacting business with the deceased, is, I think, a sufficient guarantee for the capacity of the deceased at this time; neither of these gentlemen would have sanctioned or transacted any business with the deceased, unless he had been of the most perfect capacity to understand all the details.

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I now come to consider the evidence relating to the preparation of this will : it seems, that Sir J. P. Murray had, for some time previous to the death of his father, been resident in the island of Guernsey ; shortly after his father's death, he returned to England, when, for the first time, he was introduced by Mr. Wrench, to Newstead, in the capacity of solicitor ; from that time, a great many pecuniary and legal transactions took place, in which Newstead acted professionally for Sir J. P. Murray, and, appears from Newstead's deposition, there were great many personal communications between him and Sir J. P. Murray. Now, it appears that Newstead received instructions for the will in question in the first instance from Mr. Wrench, and a letter containing the instructions is annexed to his deposition : and it is proper here to state, that Newstead deposes, that he had previously heard the deceased declare his intention to make his will when his affairs were settled, so that this letter did not contain the first intimation of the deceased's intention to make a will, though of what purport or description it was to be, does not appear. From the general import of this letter, it seems that some communications or instructions had been previously made to Newstead, by Wrench, either verbally or by letter, for securing the annuity to Lady Murray for the letter is thus:—November 6th. You duly received, the sum is to be 2800*l.* cash, and 3000*l.* Sir James wishes you to prepare his will, the substance is, to bequeath to Miss Finch all plate, linen, wine, books, jewellery, cash, &c. ; and he appoints me his sole executor and residuary trustee to pay his debts, and, should I survive, attend

to his funeral.”—From this letter of instructions this will was prepared ; however, before it was prepared, Newstead saw Mr. Wrench, and asked for an explanation as to the words “ cash, &c.” In answer, Mr. Wrench said, “ Sir James meant money in the house ;” Newstead also asked, “ whether Sir James did intend to leave anything to his family,” knowing that he had brothers and sisters. Mr. Wrench told him that he did not, that Sir James had said, “ he never had received anything from them, and therefore he should not leave them anything.” I must say, that under these circumstances, where, with the exception of a small portion of the deceased’s property, the whole residue was left to Mr. Wrench, it did behove Mr. Newstead to have been very careful as to the manner in which he prepared a will, for which he had not received instructions from the testator himself ; he must have been aware of the circumstances in which the deceased was placed, in regard to his own affairs, and to the state of his family ; it behoved, I say, Mr. Newstead to be very cautious how he prepared a will from such instructions as these ; he ought to have obtained a personal interview from Sir James, and ascertained from himself, whether he did mean to leave his property to a total stranger in blood ; more especially, as Newstead knew of the money transactions which subsisted between Sir James and Mr. Wrench. Now it was originally intended that the settlement of the deceased’s affairs should take place on the 12th of November, but the day was changed to the 16th. On the 12th, Newstead had an interview with Sir James, and it is rather singular, that on this occasion, he did not enter into

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some communication with him, on the subject of his will, he says, "that Sir James, on that day, desired him, Newstead, to have the will ready by the 16th Newstead, at first, deposed that he was not certain whether the draft of the will was prepared at the time when he saw Sir James on the 12th, but he afterwards recollects that it was ready. Now it is very true that the will was a plain and a simple will, but still, it gave nearly the whole of the property to Mr. Wrench, so that I cannot but think that on this occasion at least, Newstead should have read over the draft will carefully to Sir J. Murray and inquired of him, whether Wrench had correctly communicated the instructions for its preparation and, whether it was his, Sir James's, intention to give the whole of his property to Wrench, in exclusion of his own family. I think he ought not to have been satisfied with the explanation of Wrench "that Sir James did not intend to provide for his own family;—that because he had never received anything from them, therefore he would give them nothing." I must say I think this was incautious conduct on the part of Newstead, even although the deceased was a person of perfect capacity,—and the Court has no doubt that he was of perfect capacity still I must think there was a want of proper caution on the part of Newstead, although I do not think that he would have lent himself to a fraud. Sir James had previously made allusion to his will as if Newstead was the person to whom the preparation of it was to be intrusted.

Now to revert to the meeting which took place on the 16th of November, at the banking-house of Messrs. Coutts; the execution of the will was in

tended to have taken place at Newstead's office, but it took place at Coutts'; at the same time which the before-mentioned transactions, viz., the arrangement with the Globe office, the provision for Sir James's mother out of the residuary estate of Sir James's father, and otherwise the settlement of the claims under the uncle's will; all these were conducted in the presence of Mr. Broderip and Mr. Freshfield, who were present during the whole time. It has been said, with respect to the will, that these last parties had gone away as soon as they had transacted their particular business, and that Mr. Wrench, Newstead, and the deceased were left alone in the room at Coutts'; that during the previous transactions not a word had been said as to executing the will. Sir James (according to Newstead's deposition) said, "That he had now to go with Newstead, to sign the will, upon which Newstead produced the will, ready for execution, and incautiously, as I must repeat, considering the connexion between Mr. Wrench and the deceased, and the means by which they had become connected, proceeds to read the will over to Sir James, in the presence of Mr. Wrench. It would surely have been much more prudent and proper if he had desired Mr. Wrench to leave the room, whilst he read over the will to Sir James, and ascertained from him his real intentions; this was not done; the will was read in the presence of Mr. Wrench, and Newstead says, carefully and distinctly read, and that it was so simple a will, it could not but be understood by a person of capacity. I am not prepared to say Newstead is not deposing fairly and truly, when he says, that the will was read over

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carefully and distinctly ; I do not see any reason to distrust his evidence. He says, “ when he had read it over, he asked Sir James whether it was exactly as he wished it, that he said it was, and it was then executed in the presence of Newstead and Mr. Goodban.” I am not prepared to say, that a will so prepared is invalid ; it is one thing to say, that this is a will, of which the Court cannot approve ; and another thing to say, that it cannot support such a will ; or give it effect and operation. It is quite impossible to say the deceased was not in a state of mind sufficient for making a will ; or that he was not of perfect capacity to understand the contents of a will, particularly after the transaction which had taken place on that day. His observation as to the residence of Miss Finch being in the county of Bucks, shews, that he paid some attention to the reading over of the will ; however, notwithstanding that circumstance, he may have paid but little attention to it ; probably it was a matter of perfect indifference to him how his property was disposed of, and he would have executed any paper which had been laid before him ; still I think he executed this will with a full opportunity, if he chose of knowing the contents of it.

Assuming all this to be the case, can the Court say that a person of perfect capacity, who chooses to make such a disposition of his property, is not at liberty to do so ? Undoubtedly this is a case without suspicion ; increased by the transaction with regard to securing the annuity to Lady Murray ;—I allude to the assignment of Sir James's reversionary interest ; whether that transaction would stand in the Court of Chancery, is another

thing, but, as respects the will, it is only a circumstance which goes to increase the suspicion and degree of jealousy with which the Court will view a case such as this; but if the will is good, even if the deed be set aside, the whole property is given to Wrench, as residuary legatee.

A great deal has been said as to the principles on which the Court proceeds, in cases of this nature; it has been said, that the Court must have some proof of knowledge by the testator, of the contents of such a will,—no doubt it must, and if the proof of that fact is slight, it increases the suspicion against the will; but there must be some ground to enable the Court to say, that the suspicion is so heightened, that it is impossible for the Court to believe the testimony of the witnesses. There is no fixed technical rule on this subject; if a capable testator, a free and voluntarily acting testator has a will read over to him,—that I take to be sufficient. The authorities referred to are cases in which there were suspicious circumstances, as against particular wills, arising not only from the testimony of witnesses, on cross-examination, but from examination in chief on allegations given in by the parties seeking to invalidate those wills. The real intentions of the deceased, and the ascertainment of them forms the true rule and guide for the Court in all cases; if there be incapacity in the testator it must be proved; at the same time I do not say that it is absolutely necessary that the incapacity should be proved on a counter allegation or plea, it may be quite sufficient that the transaction will not bear the sifting of a cross-examination.

To return to the present case :—So far as the

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capacity of Sir James Murray is concerned, I see no reason to doubt that he was of sufficient testamentary ability; more particularly do I see no reason to doubt it, when I recur to the several matters which occurred on the 16th of November. I see no want of understanding on his part;—whatever may be said as to his prudence.

I think there is sufficient on the depositions to establish this will; I am not prepared to say that Newstead is unworthy of credit; although to a certain extent he has identified, and mixed himself up with Mr. Wrench.

I am under the necessity of pronouncing for this paper as a valid will; it is proved to have been read over to the deceased, and there is nothing to shew that he was not capable of understanding the contents.

I pronounce this will to be sufficiently established; but I give the costs out of the estate.

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UPFILL *against* MARSHALL.

A will (dated February, 1837) disposed of real and personal estate. A codicil (June, 1837) partly revoked the disposition of the personality. A memorandum (July, 1838)

THIS was a business of proving, in solemn form of law, the will of J. Smith, and a codicil thereto.

The will in question bore date the 27th of February, 1837; the codicil the 17th of June, 1837. The codicil was written on a distinct and separate piece of paper from the will.

(July, 1838) formally republished the will. *Held*, that parol evidence was admissible to shew *quo animo* the memorandum was made; and, upon the evidence, that the codicil was not revoked by the republication of the will.

By his will, the deceased disposed of his real and **personal** estate; by his codicil he made an **alteration** in respect to the disposition by will of a sum of 1000*l*.

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On the 10th of July, 1838, the testator caused **the** following memorandum to be written at the **end** of his will:—

“This writing was republished by the said J. **Smith**, as and for his last will and testament, in **the** presence of us.—(Two witnesses.)”

The testator executed this memorandum by going **over** the signature to the will with a dry pen.

The suit was instituted by Mrs. Upfill, one of **the** daughters of the deceased, against Mrs. **Marshall**, another daughter.

The allegation of Mrs. Upfill pleaded,

1st Article, That the deceased duly made and **executed** his last will and testament, bearing date **the** 27th of February, 1837.

2nd, That the deceased, on the 17th of June, **1837**, duly made and executed a codicil to his said **will**.

3rd, That subsequent to the making and **execution** of the will and codicil, but prior to the **10th** of July, 1838, the deceased purchased certain **freehold** premises. That meaning and intending **to** subject such after purchased real estate to the **trusts** and provisions contained in his said will, **and** for that purpose to republish his will; he did, **on** the 10th of July, 1838, produce his will and **republish** the same, to wit, by going over his **signature** with a dry pen, in the presence of two **witnesses**, who duly attested and subscribed the same.

That such republication of the will of the deceased **was** solely for the purpose aforesaid, and was wholly

1843. Did the testator intend to revoke it? certainly not
 July 17th. if the language of the memorandum is to furnish
 the proof of intention; but, admitting it to be
 UFFILL doubtful, whether he did, or did not intend
 against to revoke the codicil, then an ambiguity arises
 MARSHALL. on the face of the memorandum itself, and parol evi-
 dence is admissible to explain that ambiguity.

JUDGMENT.

SIR HERBERT JENNER FUST.

The deceased in this case made a will disposing of real and personal estate on certain trusts; afterwards, by a codicil, he made an alteration in one of the trusts declared by his will.

This codicil is on a distinct and separate piece of paper from that on which the will is written, and it is duly executed and attested.

In the month of July, 1838, the deceased caused a memorandum to be made at the foot of his will, by which he, in formal terms, declared, that he republished it as and for his last will and testament. This memorandum the deceased signed by going over the signature to his will with a dry pen; two witnesses attested the ceremony of republication.

It is contended, on the one side, that, by this memorandum the deceased republished his will; that he in effect made the will speak as of the day of the date of the memorandum, July, 1838, and thereby revoked so much of the codicil as had previously revoked a certain portion of the will.

On the other hand, it is contended, that the codicil is not thereby revoked; and the allegation, propounding the will, avers that the will was republished, not from any change in the intentions

of the testator as regarded the alteration effected in the disposition of his personal estate, by the codicil ; but, that a necessity had arisen for republishing the will, so far only as related to the devise of real estate, by reason of the testator having then recently purchased certain other real estate ; and that the intention was to subject this real estate to the same trusts as were contained in the will, respecting the real estate, and that such republication had no reference to the codicil. Now, the fact of the purchase of this real estate, after the date of the will and codicil, is admitted, and it is a circumstance which of itself would seem to introduce an ambiguity on the face of the will ; because, but for this circumstance, there seems no necessity for a republication of the will. Previously to the act of the 1 Vict. c. 26, in the instance of a will disposing of real and personal property, it was necessary to republish a will in order to pass after-purchased lands ; but republication was not necessary in the case of a will purely of personalty ; so that where a necessity for republishing a will existed in one state of things, and not in the other, I think the Court is bound to take it that the republication proceeded from that cause, which alone rendered it necessary. This case has been argued as if it depended on the question of the admissibility of parol evidence to explain an ambiguity in the language of a written instrument ; it is not so ; for there is no ambiguity in the language of the instrument ; the ambiguity or question is, *quo animo*, was the will republished ? In the case of *Guy v. Sharpe (a)*, Lord Chancellor Brougham says, " I

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(a) 1 Myl. & K. 602.

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may here observe generally on the reception of extrinsic evidence, with a view to aid the construction, and give explanation of a written instrument not to alter or control the sense—a purpose for which it can never be received—that there is manifest difference between declarations, whether verbal or written, of a testator, and the proof of facts and circumstances by the knowledge of which the Court, when called upon to construe, may be placed in the same situation with the party who made the instrument, and be thereby better able to understand his meaning.”

I think that the parol evidence in this case supplies the motive for which this will was republished. It is the meaning and intention of the testator which raises the difficulty or ambiguity. I think the evidence is admissible, both with reference to the law of this Court, and of the Court of Chancery. Decree probate of the will and codicil.

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Will pronounced against. Both attesting witnesses deposing against a signature according to the requisites of the 9th section of 1 Vict. c. 26; and there being no circumstances on which the Court could found a presumption that the recollection of the witnesses was infirm on the subject.

THIS was a business of proving the last will and testament of Mrs. Louisa Pennant, deceased. The paper propounded was signed by the deceased, and subscribed by two witnesses.

The attesting witnesses were examined, the first the Rev. F. Forde, deposed that the paper was

signed by the deceased *after* it had been subscribed by himself and his fellow witness.

The second witness deposed that the deceased did not sign the paper in his presence. (The substance of the evidence is fully stated in the judgment.)

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The *Queen's Advocate* in support of the will.

Phillimore, contra.

Cases cited, *Ilott v. Genge* (a), *Blake v. Knight* (b),
Cooper v. Bockett (c).

JUDGMENT.

SIR HERBERT JENNER FUST.

The deceased in this case, Mrs. Pennant, died on the 16th of March, 1843, being then of the age of sixty-seven years; she has left a grand-daughter who is her sole next of kin.

The deceased is alleged to have made a will in October, 1841, indeed this is the paper propounded in this cause; it is all in the handwriting of the deceased, it is signed by her, and professes to be duly attested.

Now the evidence relating to the execution of this paper is as follows. The Rev. F. Forde, one of the attesting witnesses, deposes—

“I was on a visit at Colonel Kingscote’s house in the October of 1841, and again in the spring, about May, of the following year. It was during one of these visits that I witnessed Mrs. Pennant’s will. I am not at all positive during which of my

(a) 3 Curt. 160.

(b) *Ante*, p. 547.

(c) See the next case.

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visits it was that the will was signed ; my impression had been, from the recollection I have of the state of the weather at the time, that it was during the latter visit ; but I have reason, from information I have since received, to doubt my correctness in that respect."

Now I read this in order to show that the Court cannot rely very accurately on the recollection of this witness.

"I had nothing to do with the preparation of the will. On the occasion of its execution Mrs. Kingscote, the deceased's sister, requested me to step upstairs to her morning room ; I found the deceased reclining on a sofa ; there was a paper lying on the table, which Mrs. Kingscote, who accompanied me into the room, stated to be Mrs. Pennant's will and which she (Mrs. Kingscote) requested me sign. Mrs. Pennant, the deceased, who appeared to be very much affected, sat with her handkerchief to her eyes, and did not make any remark about the will ; it was Mrs. Kingscote, not Mrs. Pennant, who requested me to sign the will. The will was already written ; I did not notice the handwriting. At Mrs. Kingscote's desire I wrote at the foot of the will the words ' signed, sealed, and delivered in the presence of us.' I thereupon signed my name underneath then. I did this in the presence of the deceased, of Mrs. Kingscote, and of White, Colonel Kingscote's butler ; I then gave the pen to White and he signed his name underneath mine, in the presence of myself and the other parties. The deceased, the instant after White had signed, took the pen and signed her own name to the will ; she signed under White's name, and when she had

signed she made some remark to the effect, that now she had settled all her affairs, upon this I withdrew. I feel a very strong impression, almost tantamount to a certainty, that Mrs. Pennant, the deceased, signed the will in the presence of White as well as myself; I do not, however, like to swear to that fact unequivocally, knowing that White has expressed an impression to the contrary; had he not expressed that doubt I should have had no doubt at all upon the point, and I have still the strongest impression that it was as I have stated; at the same time I would observe that, owing to the state in which the deceased was, the thing was hurried through very quickly, and I did not note the circumstances so accurately as otherwise I should have done. I recollect when the deceased had signed, Mrs. Kingscote observing that there was no further occasion for White, and my impression is that this was done before he had left the room. Mrs. Kingscote took upon herself the whole direction of the matter."

Now I am informed that Mrs. Kingscote does not remember anything about the transaction which could afford any further light on the subject.

The *Queen's Advocate*.—That is so, Sir.

Then when I am told this, and when I find Mr. Forde so inaccurate as to the time when the transaction took place, I cannot place any great reliance on his memory; indeed, he says, the whole matter was very hurried, and that he had not time to make any very accurate observation of it.

Now White, the other witness, has no doubt as to the time when the will was signed; he says that it

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is true that he once stated that it took place in May, 1842, but that he said so because Mr. Forde stated that it was in May, but he has no doubt it was on the 14th of October, 1841, and he is certain of this from referring to some memoranda he made at the time. He says—

“I did not know anything of the preparation of the paper; on the occasion of it being signed the bell up stairs rung and I answered it; when I went into the room there were Mr. Forde and Mrs. Pennant, no one else.”

Now Mr. Forde says that Mrs. Kingscote was present, and took upon herself the whole direction of the matter.

“Mr. Forde asked me to sign that paper for Mrs. Pennant; he did not say what the paper was; he wrote some words on the paper, and underneath them he signed his name. When Mr. Forde had signed his name, he gave me the pen, and asked me to sign the paper. I wrote my name under his; when I had done so, I asked Mr. Forde ‘if that would do,’ he said ‘yes,’ and I left the room. It was Mr. Forde, not Mrs. Pennant, who requested me to sign; it was done in her presence; she was sitting on a chair or a sofa close to the table on which the paper was, but she did not take any part in the business. She sat with her handkerchief to her eyes; she did not sign the paper in my presence, neither did she speak a word while I was in the room. I am positive Mrs. Pennant did not sign her name, or put pen to paper while I was in the room. I am confident the signature ‘Louisa Pennant’ was not written by Mrs. Pennant, or by any other person in my presence.”

The Court has to decide on the evidence of these two attesting witnesses ; the one having a strong impression that the paper was signed in his presence, although signed after he and his co-witness had subscribed ; the other having no doubt—being a fact quite certain that the deceased did not sign at all in his presence. There are no circumstances of which I can give the party propounding the will the benefit, so as to pronounce for a due execution. Mrs. Kingscote does not recollect anything about the transaction, and even if she could have stated that the deceased signed in the presence of both witnesses, the Court would have been left in great difficulty in coming to a decision that the will was duly executed ; because in order to do so it would be necessary to hold, according to the construction which the Court has lately put on the Wills Act, that the deceased signed *before* the witnesses subscribed ; this would be directly contrary to the evidence of both witnesses.

There are no circumstances in this case on which the Court can rely to enable it to pronounce for this paper, and I must, therefore, refuse to decree probate of it.

I beg to state that had I felt myself enabled to do so, I would have given the parties the same benefit of any circumstances as I did in the last case (a).

(a) The Court referred to the case of *Cooper v. Beckett*, which immediately follows this case.

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COOPER *against* BOCKETT.

1 Vict. c. 26,
s. 9. A will
must be signed
by a testator
before it is sub-
scribed by wit-
nesses.

Will held,
upon the cir-
cumstances, to
have been sign-
ed before the
witnesses sub-
scribed, al-
though one wit-
ness deposed
that the testa-
tor signed *after*
he and his fel-
low witness had
subscribed, and
the other wit-
ness deposed
that the part of
the will, where
the signature of
the testator was
written, was
blank when she
subscribed.

THIS was a business of proving in solemn form
law the will of R. H. S. Cooper, late of Pall Mall,
East, deceased, promoted by H. S. Cooper, brother and only next of kin against D. S. Bockett one of the executors named in the will.

The deceased died on the 17th of April, 1843. The will propounded was contained on the first side of a sheet of letter paper; it was in the handwriting of the deceased; certain words in the ninth and tenth lines had been altered by other words in large text character being written over them; the twenty-first, twenty-second, and twenty-third lines were obliterated by ink marks.

The conclusion of the will was as follows:—

"I name executors to this my will, Daniel Smith Bockett, of the Law Assurance Society, to whom I will one hundred pounds sterling."

And my brother, Henry
Spencer Cooper, above
named
made at 9, Pall Mall, East,
this seventh January,
1843.
Codicil to my man, W.
Cobbett, I will fifty
pounds, clear of tax.

Witnesses to
the said will.

Signature.

George Crittenden.
Mary Crittenden.

R. H. S. Co

9, Pall Mall, East
Servants at house

Seal.

This will was found in an envelope, subscribed
"The will of Robert Henry Spencer Cooper, 9, Pall
Mall, East, 7th Jan., 1843."

This will having been propounded, the two sub-
scribing witnesses were examined as to the factum.

The evidence of the witnesses was to the following

effect:—That the deceased said to the first witness, “I want you to sign your name to this paper ; this is my will.” That he desired the witness to fetch his wife (the second witness) up stairs first. That the two witnesses signed the paper by the direction of the deceased. That the deceased then took the pen and wrote, and when he had done said, looking at the witnesses, “this is my name in your presence.” That the first witness did not see all he wrote, but saw him make the large R of his name.

The second witness deposed in effect that she and her husband signed the will in question by the desire of the deceased, and then the deceased wrote something, but what she cannot say, but he said, “This is my will and my name in your presence.”

The evidence is fully stated in the judgment.

It was proved in evidence that W. Cobbett, the legatee, mentioned at the conclusion of the will, did not enter the deceased’s service until the 23rd of March, 1843.

The cause came on for hearing.

Jenner, in support of the will.

It is not absolutely necessary that the Court should have positive affirmative evidence by the attesting witnesses, that a will was signed before they subscribed, the Court will decide on the fact of due execution, by considering the evidence with reference to the probable circumstances in each case. The testator evidently knew that it was necessary for both witnesses to be present at the same time, for he stopped the first witness, when about to sign, and desired him to fetch his wife before doing so. The inference is that he also knew that he must sign

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the will before the witnesses subscribed. The witnesses are persons unaccustomed to attest legal instruments, indeed the first witness admits that this was the first will he ever signed, and in all probability his wife was similarly circumstanced; the witnesses were flurried and confused, and in no state to observe minutely and correctly what was written on the face of the paper. Neither of the witnesses, according to their statements, observed the alterations and obliterations in the body of the will; it is hardly credible that these could have escaped notice had the witnesses given the most cursory glance at the paper; in all probability their whole attention was engrossed in writing their names.

If the Court cannot place implicit reliance on the recollection of these witnesses, the fair presumption is, that the signature of the deceased was written before the witnesses subscribed; if so, the circumstances deposed to amount to a sufficient acknowledgment of the signature; *Ilott v. Genge* (a); *Blake v. Knight* (b).

Supposing the Court to give credence to the witnesses, still this will is duly executed. The whole circumstances attending the execution, formed one continuous transaction.

Addams, contra.

If witnesses to a will are ever to be credited in this Court, when deposing against a due execution, credence must be given to the witnesses in this case. Both witnesses are positive that the space on the paper, now occupied by the testator's signature,

(a) 3 Curt. 160.

(b) *Ante*, 547.

as blank at the time they subscribed. The first witness goes further;—he saw the testator commence signing his name; he saw the first initial letter of the signature actually made. The witnesses might not observe the alterations and obliterations on the face of the will, and might yet see that the surface of the paper, immediately close to where they signed their names, was blank; it is quite consistent with probability that they did not observe the body of the will, but scarcely credible, that they should not observe whether there was a signature almost touching the exact spot where they signed: moreover, it is not yet proved, when these alterations were made; the will was certainly altered after the alleged execution; for a legacy to V. Cobbett is added, and this person did not enter the service of the testator until after the time of execution; the argument assumes the fact that the alterations were made previously to the execution. *Blake v. Knight* was a very different case from the present; there was a most precise and formal attestation clause; the testator was a person particularly conversant with the execution of legal instruments; the witnesses were not so positive, as to the circumstances attending the execution, as the witnesses in this case, and they were giving their evidence three years after the transaction had occurred.

If this will was signed by the testator one instant after the witnesses subscribed, and there was no re-subscription, it is invalid.

JUDGMENT.

SIR HERBERT JENNER FUST.

This is certainly a case in which the Court finds

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itself placed in very considerable difficulty, much increased by no decision having as yet been given in the appeal in *Ilott v. Genge* (a).

The deceased, in this case, Captain R. H. Cooper, died on the 17th of April, 1843; and the will propounded, is dated on the 7th of January, 1843. This will is all in his own handwriting, and there are certain alterations and obliterations on the face of it; some of which appear to be legible; and it bequeaths certain annuities and legacies to different individuals, and it appoints his brother, Mr. H. Cooper, barrister-at-law, and Mr. Daniel Smith Bockett, of the Law Life Assurance Society, executors, and it gives to this latter gentleman a legacy of one hundred pounds. This will is signed by the deceased, and purports to be attested by two witnesses; and, at the end of it, is a codicil, giving a legacy of fifty pounds to his servant; as to the codicil, however, it is clear, that it can have no effect, as the servant did not come into the deceased's service until March, and the will being dated in January, it is clear that the codicil was added, after the execution of the will, and not being attested according to the requisites of the law, the codicil is void. Now, as I have said, the paper purports on the face of it to be signed by the deceased, and to be witnessed by George Crittenden and Mary Crittenden, servants, at the house, No. 9, Pall Mall East, where the deceased, a retired captain of the engineers, lodged.

The question for the Court to determine, on the evidence of Crittenden and his wife, is, whether the will was signed by the deceased, in their presence

(a) 3 Curt. 160.

or whether the signature was acknowledged in their presence, when they attested the will. On the face of the will there are certain alterations, which alterations are made in such a manner as could hardly have failed to attract the attention of any person who saw the paper lying open on a table, when they were called to attest it.

The witness, George Crittenden, states, that,—and it is not immaterial in considering his testimony, to bear in mind that he states, that, at the time of the transaction, he was in a state of confusion: he is asked as to the alterations on the face of the will, and he says, with respect to them, “I cannot say whether they were or were not on the will when I signed it;”—it is somewhat extraordinary, if they were then there, that he should not have observed them at the time, as they are so very plain and distinct, that it is hardly possible they could have escaped the attention of persons called to attest the paper. He says, “I have something on my mind that there was something of the kind too; but I was confused and flurried at the time; for though I was but signing my name to a will, yet I had never done so before, and I did not know but that trouble might come of it; and the captain was a very sharp and severe man, and I was not so much at my ease as to observe exactly what occurred, or what appearance the will had. I do firmly believe, however, that there was some black scratching on the will when I signed it.” He states, therefore, that, at the time of the transaction, he was in some degree of flurry and confusion, and not so much at his ease, as to observe exactly what occurred, and, therefore, the testimony of such a witness must be taken with some degree of allowance.

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Now the evidence of this witness and his wife, the only evidence which can be taken as positive at the point—goes to establish the fact that the will was signed by the deceased, after they had attested it, for both of them state their belief that there was a blank space where the signature now is, where they attested the will. The witness, George Crittenden, states, “That he had been out for the deceased, with a letter for Mr. Cooper, his brother, and, on his return, that he went to his room, to tell the deceased that he had not found Mr. Cooper at home, and had put the letter into the letter-box. He says, “I found him writing, at a table, and when I had delivered my message, he desired me to sit down, and when I had been sitting so about five or ten minutes (and he was writing during that time) he said to me that he wished me to put my name to something; his words were, ‘I want you to sign your name to this paper;’ that was the paper before him,—the paper now before the Court. He goes on to state.—‘Will you?’ I said, ‘I don’t know what I am going to sign, sir!’ He said, ‘Oh you need not be afraid, for this is my will.’ I then rose up to sign, and he then said, ‘you had better fetch your wife up-stairs, first.’ And I said, ‘shall I do so, sir?’ and he said, ‘Yes.’ From that I went and fetched her up, and when we went into his room, we found him standing at the table, which he had been writing at, with a pencil in his hand, and, as he was standing, he wrote my name and my wife’s name in pencil. Before he had been writing with a pen. My wife asked him if he knew how to spell our names; and he said ‘Yes’ and repeated it,—‘Crittenden,’ and my wife said ‘That was right.’ Then he sat himself down, and

called us to the table, and he put the will towards me, and said, 'You sign your name there,' pointing to my name, which he had written in pencil, and I took the pen, and wrote my name over the pencil-mark. Then he said to my wife, 'Now you sign your name on this pencil-mark,' pointing to the one under mine. 'You'll write your name better than he has done his.' Then my wife signed her name. Then Captain Cooper took the pen from my wife, and wrote, and when he had done, he said, looking up to me, 'This is my name, in your presence;' and I understood, then, that he was writing his own name: I did not see all he wrote, but I saw him make the large R of his name, and there was a black seal at the left-hand corner quite; but there was nothing said about that, and, after he had wrote his name, he said, 'Now you have done some good for yourselves.' I don't know exactly if that was the expression: nothing more passed. He said, 'Mrs. Crittenden, I don't want you any more;—you can go;' and my wife went down-stairs. I stopped a few minutes afterwards, when he told me that he did not want anything more with me, and I went away." Then he states, "that he was perfectly competent, at the time, and perfectly sensible to the last, almost. He wrote nothing but his name; at least, I believe it was his name, in our presence. As soon as he had done, he put down the pen, and wrote no more. Before he signed his name he made a mark round ours. The will, now produced to me by the examiner, is the will which I and my wife signed our names to, as I have deposed, and the large R in Captain Cooper's signature is what I saw him

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write, after I had signed my name, and my wife had signed hers: the words '9 Pall Mall, East'; servants at home,' were not written in my presence; to the best of my belief, Captain Cooper wrote nothing, in my presence, but his name."

The second Article is, as to the alterations in the will, which, he says, he did not observe.

To the third interrogatory, he says, "Captain Cooper did sign his will in my presence; I believe that he did, and he certainly acknowledged it in my presence, for he said, 'That is my name.' He signed, as I have stated, after I and my wife had signed our names to it. The very words he used were, 'this is my name in your presence,' and he looked up to me, as I was standing at his right-hand side at the time. My wife was present at the time, standing behind me; it was after we had signed our names." And he says, to the fourth interrogatory, "I do not believe that Captain Cooper's signature was to the will when I and my wife signed it; there was a blank space where his signature now is, when I signed my name." And he goes on, in answer to the fifth interrogatory, to say, "When I have been questioned about the matter, I have stated, and it is the fact, that Captain Cooper had a pencil in his hand, and wrote my name, and my wife's, on the place where we afterwards signed our names. I have said that he was writing with a pencil, when we went into the room. I have never said, and it is not the fact that I first signed my name to the will, in question, at the request of Captain Cooper, and then called up my wife, who also signed. I have never said, and it is not the fact, that Captain Cooper signed his name

to the will in question, after my wife had signed her name to it, I have never told my wife so ; I will swear that I never have."

Now this is the evidence of George Crittenden, and if he is to be taken as having deposed correctly and truly, there is very little doubt, that he means to represent that the deceased signed his name after the witnesses had subscribed the will.

The other witness, Mary Crittenden, states, "that she was called into the room, by the desire of the deceased," and she says, "And so I went, with my husband, to the captain's room ; and there the captain was standing at his table, with a piece of paper before him, and he took a pencil, and said, 'that he wanted us to sign our names, and he would pencil them first, where we were to sign,' and so I said, 'I would take the liberty of asking him if he knew how to spell our names,' and he spelt it, and spelt it right, and when he had written the names, he gave my husband the pen, and told him to write his name over the pencil-mark, and my husband wrote his name as he was told, and when he had written it, the captain gave me the pen, and told me to write mine, and said, 'I dare say you will write it better than he has;' but I don't think I did write it better. However, I wrote my name as the captain told me, over where he had pencilled it, and then the captain took the pen, and made a kind of circle round our names, and then he wrote something, but what it was I cannot say, for my husband was standing near him, and in the way ; but the captain said, 'This is my will, and my name, in your presence, and you have done some good for yourselves.' These were the words

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he used, as well as I can recollect, and he said nothing more, except to tell me to go down-stairs as he did not want anything more with me, and I went, leaving my husband with him, and that is all I know, or recollect about it." She identifies the paper as that which she and her husband signed. She says, "But whether he wrote the words, '9, Pall Mall, East, servants at house,' and we had signed our names, or what he wrote, I cannot say, for I did not see. It was a blank space to the right as well as I can recollect; the blank seal was at the left hand corner; and I should have known it was a will, even if the captain had said so, though I had never seen one before, by the seal; I remarked it so at the time."

To the second Article she says, "she did not notice whether there were, or were not, any of the alterations which are now upon it."

In answer to the third interrogatory, she says "I cannot say whether Captain Cooper signed the will in my presence, or not; I did not see what he wrote, but he said, 'This is my will, in your presence;' and so, I suppose, he had written his name when he said so. I do not recollect the words he used, better than I have told them. My husband and I were both present at the time Captain Cooper used those words, and it was after we had signed our names to the will."

To the fourth interrogatory, she says, "I cannot say that Captain Cooper's name was signed to the will, when I signed it: as well as I can now recollect, it was all blank where I now see Captain Cooper's signature:" and to the sixth interrogatory she answers, "My husband had not signed Captain

Cooper's will, before I was called into the room to sign it. I will swear that my husband signed it afterwards, in my presence. My husband has never told me that Captain Cooper signed the will after I had left the room. It was after I had signed my name, and not before, that Captain Cooper made the mark round about our names."

Now, as far as she is concerned, Mrs. Crittenden states, "that she did not know what the deceased wrote; that she saw him write something, but what it was she cannot say; that she did not see the name of Captain Cooper, and that where the name now is, was all blank." The husband is more precise, and he says, "that the will was signed by the deceased, after they had signed their names, and that he saw the deceased make the large R to his name."

The question, then, for the Court to determine, under these circumstances is, whether there has been a due execution of this will? By the 9th section of the Act of Parliament, it is absolutely necessary that the deceased shall have signed the will, or have acknowledged his signature in the presence of two witnesses, present at the same time, and that they should have attested it in the presence of the testator, though not of each other. The interpretation which the Court has put upon the section is, that the testator must sign or acknowledge his signature, before the witnesses attest, and that if the witnesses attest before the signature of the deceased is affixed to it, the will is not duly executed within the provisions of the Act. The words of the section are very precise, and I think it would be attended with dangerous consequences, if the Court were to hold will valid which has been signed in the presence

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of two witnesses, who have attested it before the signature of the testator was affixed to the will ; for where is the Court to draw the line ? Suppose the witnesses attested an hour before the testator signed, or a day, or a week, or any other time ; where is the Court to stop, if it gave a latitude of construction to this section of the Act ? Suppose it were one month, or six months, or a twelvemonth, after the testator had signed the will ; and whether it be, at the time of the transaction, or sometime before, makes no difference. The words of the Act are prospective, " such witnesses *shall* attest, and *shall* subscribe the will in the presence of the testator." It does not appear to me that the requisites of the Act would be complied with, if the Court were to hold that a testator might sign, after the witnesses had subscribed, either at the same time, or two hours, or two weeks afterwards. I am, therefore, of opinion that, if it appear, from the evidence of the witnesses, and the *res gestæ* of the case, clear, that the will was signed by the testator, after the witnesses attested, it is not a good execution of the will. The question therefore, is, what is the result of the evidence ?

Now as I have already read, George Crittenden was the first witness who entered the room, and was with the testator alone before the execution took place ; he states that he was five minutes in the room whilst the testator was writing, before his wife was sent for, and that he desired that the wife should be fetched ; and if the Court is to trust the evidence of George Crittenden, the deceased wrote the names of the witnesses in pencil ; he says, he marked their names in pencil, saying,

“ You sign your name there,” pointing to the name of the witness which he had written in pencil, and the witness wrote his name over the pencil-mark, and his wife did the same, and the deceased then took up the pen and wrote, and said, “ This is my name, in your presence.”- Here it seems as if there were an acknowledgment in the presence of two witnesses by the testator of his name being at the time to the will; and the only question is, whether this was done before or after the attestation of the witnesses, and all depends upon the recollection of this one witness, as the wife does not remember the circumstances. The husband is more precise, if the Court can attend to his account of what took place, considering the state of mind he was in at the time, “ a state of confusion,” as he admits; and the Court has been called upon (and very properly) to pause before it trusts implicitly to the evidence of these two witnesses; and looking at the paper itself, I cannot place implicit reliance on the accuracy of these witnesses. What are the facts? The paper is all in the handwriting of the deceased. It concludes, “ I name executors to this my will, D. S. Bockett, of the Law Life Assurance Society,” and a wide space occurs after “ will,” as if there had been, and evidently there had been, the entire name, and the seal covered part of the name, and “ Daniel Smith” is interlined. After “ Society,” there is also interlined “ 60, Lincoln’s Inn,” and written over another word “ to whom,” then “ I will one hundred pounds sterling, and my brother Henry Spencer Cooper above named,” part of this had been covered by affixing the seal. Then at the end, “ at 9, Pall

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Mall, East," with part of the word "made" :
 "this seventh January, 1843." Then follows
 a circle, "witnesses to the said will," and bel
 "signature," and this seems to be in the same
 as "9, Pall Mall, East, servants at house," and
 is preceded by "George Crittenden, Mary C
 tenden," and "R. H. S. Cooper,". is at the end
 the paper.

Now, looking at the paper, I should say t
 "R. H. S. Cooper" was written at the same t
 that the latter part of the will was written ; i
 in the same ink and same writing as "signatu
 and "witnesses to the will," and would appear
 if the deceased had written "witnesses to the wi
 and afterwards, the word "signature," otherv
 I do not know what is the meaning of the w
 "signature," unless it be the signature of the wi

I must say I can place no strong reliance on
 impressions of the witnesses—from the confus
 in which George Crittenden admits he was wl
 he was required to sign the will ; his mind v
 not sufficiently at ease to observe the transacti
 Here is a bare recollection of these two witnes
 contrary to the appearance of the paper, that
 signature "R. H. S. Cooper" was added after th
 had attested the execution ; and the Court, if it
 holds, must rely entirely on the accuracy of th
 recollection of the facts. In the case of *Blake*
Knight (a), the Court pronounced against t
 recollection of three witnesses, in favour of t
 validity of the paper, and from the whole circu
 stances of the case, held that the witnesses w

(a) *Ante*, p. 547.

mistaken. There, the witnesses were examined three or four years after the transaction; here, they have been examined within a few months. But in this instance, one of the witnesses is not positive, and speaks to her recollection and belief that the name of the deceased was not to the will when she signed it; that "as well as she can now remember," it was all blank where his signature is. Now where the *res gestæ* do not confirm the impressions of the witnesses, the Court must look at the circumstances of the case, as it is always at liberty to do. In *Blake v. Knight*, I did not give implicit credence to the witnesses, not from any doubt that they intended to speak the truth, but because they did not recollect the circumstances sufficiently to speak with accuracy. George Crittenden admits, that he was in a state of confusion, and though he says, he saw the deceased make the large R of his name, and though he does not believe that the name was to the will when he and his wife signed it; he says he was flurried and confused at the time, and not sufficiently at his ease to observe exactly what occurred. I say, therefore, that the Court cannot give implicit credence to this witness, so as to hold that the paper was not executed according to the requisites of the Act, and that the witnesses attested before the execution of the will.

Under the circumstances, I am of opinion that the paper was duly executed by the deceased, and that though the deceased may have written on the paper in the presence of the two witnesses, the witnesses are mistaken as to what the deceased did write, which, as far as the Court can judge, may

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have been the word "signature," on the left-hand of the circle, or "9, Pall Mall, East, servants house," at the right-hand corner of the paper. I am of opinion that the Court is bound to pronounce for the validity of the paper.

With respect to the alterations, I must have some evidence of what they are, and whether the parts obliterated can be made out.

Until I have some information as to the alterations, I cannot give my sentence in the cause.

On the 8th of August, on the motion of *Jenne* upon the affidavit of Mr. Netherclift, an engraver explaining what the words in the will original were, the Court pronounced for the will, with the alterations.

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Quere, how far, in cases of alleged unsoundness of mind, hereditary constitutional insanity may be pleaded.

FRERE *against* PEACOCKE.

SIR THOMAS GEORGE APREECE, Baronet, died on the 30th of December, 1842. Certain papers were propounded as containing the last will and testament of the deceased. Probate of these papers was opposed by Mrs. Peacocke, the sister, and sole next of kin of the deceased; the principal ground of the opposition thereto being, that the deceased was not, at the time of executing these papers, of sound mind. In the allegation in support of the case on behalf of the next of kin, an Article pleaded, "That the said Sir Thomas George Apreece, deceased, left him surviving Thomas Apreece and

William Apreece, natural sons of the late Charles Shaw Apreece, (C. S. Apreece was the paternal uncle of the testator,) both of whom were under confinement as lunatics; as was also the late John Apreece, (another paternal uncle of the testator,) and who died under such confinement."

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The admission of this Article was opposed by *Phillimore* and *Jenner*.

Hereditary or constitutional insanity cannot be adduced as evidence of individual or particular insanity; there is no recorded instance of a plea of this description in the reports of the decisions of this Court, and the point is one of a nature too extraordinary to have escaped observation.

If a plea of this nature be admitted, the Court must be prepared to try issues depending so intimately on questions of fact, that they cannot be satisfactorily determined without the intervention of a jury; this Court cannot send a case to be tried in a Court of law, in which Courts this species of evidence has been repudiated. Supposing this Article to be admitted, it follows that the executors must be permitted to counterplead it, as by shewing that the insanity was inherited *ex parte maternâ*, and not *ex parte paternâ*; and where, as in this case, it is sought to infer constitutional insanity in the individual instance of illegitimate cousins, by proving that the parties are not in fact the illegitimate offspring of C. S. Apreece, although acknowledged by him as such.

In *M'Adam v. Walker* (a), a case before the

(a) 1 Dow. P. C. 161.

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House of Lords, on appeal from the Court Session of Scotland, this very point was raised ; the following passage occurs in the report :—" It was attempted, on the part of the appellant, to aid the case of constitutional insanity in Mr. M'Adam, by going into evidence of the insanity of some of his relations by the mother's side ; but this was resisted by the Court of Session." In the argument of the appeal at the bar of the House of Lords Sir Samuel Romilly observed, on this part of the case (*a*), " In regard to the attempt to prove a hereditary tendency to insanity, if this were to be allowed, it might be necessary to follow out the proof through a great number of collateral relations and to try twenty causes instead of one. Mr. Clerk (the opposite counsel) with all his knowledge of Scotch law, has not been able to produce a single authority for such a proceeding. Something of the kind was done, or attempted, in *Kinloch's case* and not stopped ; that was all. In a late case in the Common Pleas, the heir-at-law offered to prove hereditary insanity against a testator, but this proof was rejected ; so that, in the Law of England at least, there is an authority against it." In a later case, *Doe dem. Mather v. Whitefoot* (*b*), it was proposed, with a view to shew that a particular party was not competent to execute a deed, to call a witness, whether a sister of the party was not insane ? It was objected, that the Court was not trying the question of the sister's sanity. Mr. Baron Gurney held, that the question could not be asked. More weight is due to this case than

(*a*) p. 173.(*b*) 8 Car. & Pay. 272.

may be commonly claimed for a decision at *nisi prius*, for it appears, that in the course of the same trial, Mr. Baron Gurney, feeling some doubt on a point raised before him, consulted Mr. Baron Alderson; may it not be fairly inferred, that if the learned judge had felt any doubt on the first point, he would have resorted to the same judicial assistance.

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The *Queen's Advocate*, *Addams*, and *Harding*, *contra*.

This question has received judicial consideration, and has been decided in this Court; the opinions of judges of other Courts may, therefore, be disregarded. In the case of *Tyrell v. Jenner* (a), the seventh Article of an allegation in the cause is thus:—"Seventh (*as reformed*), That the family of the said deceased was subject to mental insanity; that Sarah, one of the sisters of the said deceased, became deranged several years before her death, and continued so until she died; and that J. T. Jenner, the son of the said deceased, having also become deranged in July, 1804, a commission in the nature of a writ *de lunatico inquirendo* issued, under the great seal of Great Britain, on the petition of the deceased, and that upon the inquisition taken thereon, the said J. T. Jenner was found a lunatic." This Article stands *as reformed*, thereby shewing that the consideration of its admissibility underwent discussion and deliberation. The case afterwards went to the Delegates, and this very Article must have been subjected to the criticism of Com-

(a) 2 Hagg. 84, Printed Cases, vol. 8, p. 42.

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mon Law judges and counsel ; if there were any settled rule in Courts of law against the admission of such a plea, it would have been raised in the Court of Delegates.

In *M'Adam v. Walker*, the Lords' gave no opinion on the admissibility of the plea of constitutional insanity ; Lord Eldon said, " This will dispense with the consideration of the other very delicate point, whether the evidence to shew hereditary insanity in the blood ought to have been received in a case of this nature." This shews that Lord Eldon considered that the *nature of a case* must govern the admissibility of such a plea ; his language is inconsistent with a general fixed rule, that no such plea could be offered. The question must be admitted to require a more solemn determination than could be afforded on a question occurring at *nisi prius*.

JUDGMENT.

SIR HERBERT JENNER FUST.

The present case involves a question which has very properly been brought under the notice and consideration of the Court.

The substance of the Article objected to is, to plead hereditary or constitutional insanity existing in the family of Sir T. G. Apreece, the deceased in this cause, thereby intending, as I presume, to raise, at the hearing of this case, an inference, that it is not improbable that the deceased himself should have been insane.

Now, when I first read this Article, I was struck with the singularity of it, more especially as, in a

late case (a) occurring in this Court, in which constitutional insanity was pleaded generally, the Court rejected an Article of a somewhat similar nature.

The objection to this particular Article has not been supported by reference to any decided case, which can be insisted on as a strict precedent ; for in the case of *M'Adam v. Walker*, the Lord Chancellor, and the other members of the House of Lords, by whom he was assisted, gave no opinion on this point. I do not think that the other case, which occurred in a Common Law Court, can be considered a decision of this point upon principle. A case, however, has been cited, in support of this plea, and one which comes much nearer the question ; a case which occurred in this very Court, before my learned predecessor in this chair ; and in which he was of opinion, that an Article of a similar nature ought to be permitted to stand. I say he was of such opinion, because, although there is no report of what occurred on the occasion, the Article must have undergone discussion and consideration, for in the printed case, prepared for the hearing of the appeal before the Delegates, the particular Article stands "*as reformed.*" That Article was admitted under the circumstances of that case ; and it has been argued, that it conclusively decides that hereditary insanity may be pleaded in this Court. I think that argument is well founded, and that, to a certain extent, the case of *Tyrell v. Jenner* does go to show that, under certain circumstances, such a plea is admissible ; but then comes the question, whether the Article now before the Court is admissible ? It

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(a) *Turner v. Penny*, Prerog., April 21st, 1843.

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pleads—that the two natural sons of Charles Shaw Apreece, an uncle of the deceased, and John Apreece, also an uncle of the deceased, were, or now are, under confinement as lunatics. I must confess I think this plea carries the case far beyond what the decision in *Tyrell v. Jenner* warrants; and I should be very unwilling to extend the principle any further. It is very remarkable that this case is the only one in which such an Article can be shown to have been admitted; however such an observation is fairly answered by saying that there is no case produced in which such an Article has been rejected. Be that as it may, it does certainly strike me as a very remarkable thing, that this is the only case counsel have been able to find on this point.

If the present plea is admitted, there must be an opportunity afforded to counter plead; evidence may be gone into, on the one hand to show that there is insanity on the father's side and none on the mother's; on the other, that the insanity is solely inherited from the mother; and the case may branch out into various collateral matters and issues. In *Tyrell v. Jenner*, the party whose insanity was pleaded was a sister of the whole blood, immediately and inseparably connected with the testator; here, to put the case at the highest, the parties are only collateral kinsmen. Where is the Court to stop? What is the degree of relationship to which this hereditary malady is to be limited in pleading? If the Court once extends the principle to collateral relations. If, in this case, it had simply been pleaded, that a brother of the deceased had been insane, so far the case of *Tyrell v. Jenner* and the present case would have been identical; except in—

deed, that the former case extended the principle to the son of the party. Here it is sought to enlarge the principle to the natural children of the uncle of the deceased. I think in this respect the two cases materially differ, and I will not carry the principle established by that one case further than the case itself warrants.

This Article must be struck out of the allegation.

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July 21st.

FURRE
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PRACOCKE.

MUDWAY *against* CROFT.

Committee of R. WICKS, a Lunatic.

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THIS was a cause touching the disposition of the personal estate of Ann Wicks, late of Cheltenham, in the county of Gloucester, spinster, who died on the 17th of June, 1841, aged seventy-three years, possessed of personal estate of the value of nearly 80,000*l.*, in addition to real estate of the annual value of 1000*l.*, leaving Elizabeth Mudway, widow, her cousin-german, and only next of kin, and the party entitled to the whole of her personal estate, in case the deceased should have died intestate.

Criteria by which to test and ascertain whether natural or innate eccentricity has exceeded the bounds of legal testamentary capacity.

A testamentary paper, dated the 10th of December, 1830, was propounded, as the will of the deceased, by Sir A. D. Croft, the committee, appointed by the Court of Chancery, of R. Wicks, the residuary legatee named therein; its admission to probate was originally opposed by Mrs. Mudway, but she having died during the progress of the suit, her interest was subsequently represented by her executors.

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The allegation propounding the will pleaded, that the father of the deceased died when she was seven years of age; that her mother was a person of secluded and also of penurious habits, which the deceased acquired by living with her mother; that the mother died in 1805; that the deceased, although eccentric in her manners, and although her education had been neglected, was acute in business, conducted her own affairs; was tenacious of her legal rights; received her own rents; invested her savings; and communicated with her solicitors by letter and otherwise.

That in the year 1826, in consequence of the deceased labouring under a delusion of mind, she was attended by a medical man; but that she recovered from such malady. That in November, 1829, the deceased was, on the same account, again placed under the care of the same medical man, and so remained until February, 1830, when she again recovered. That such delusion was on one subject only. That in April and in June, 1830, two tenants of the deceased paid to her personally certain rents; that in January and July, 1831, the deceased wrote to a tenant on the subject of rent due to her.

That on the 10th of December, 1830, the deceased wrote and signed the will propounded, thereby disposing of her personal estate.

That on the 8th of August, 1833, a will of her real estate, prepared for her by a solicitor, was executed by the deceased, and was duly attested. That at the time when the deceased gave instructions for this will she stated to the solicitor, that she had executed a document for the disposal of her personal property.

That on the 17th of December, 1839, the deceased delivered into the custody of such solicitor certain deeds and papers, and among them the will propounded, and the will of her real estate, and desired to have copies thereof made for her.

An allegation in answer, on behalf of the executors of Mrs. Mudway, pleaded,

That the deceased was generally reputed to be crazy. That from 1826 to 1829, the whole conduct of the deceased showed her to be insane; that she entertained mental delusions on a variety of subjects, conceived herself to be pregnant by an illustrious individual; threw her money on the floors of her house; ordered her plate to be buried; accused, without any cause, persons of robbing her; walked about her house in a wild and hurried manner; was in the habit of muttering to herself, and holding converse with imaginary persons; frequently imagined her house to be full of people, and on one occasion slept at an inn, on the delusive supposition that her house was crowded with strangers. That she would order her table to be laid out for a party when no persons were coming to her; bowed from the window to, and played cards with, imaginary persons. That the deceased was careless in her dress, and otherwise generally indifferent or neglectful of the usages and decencies of society. That on the 21st of December, 1839, a commission, in the nature of a writ *de lunatico inquirendo*, issued, under which the deceased was found to have been a lunatic from 1st of December, 1839, without lucid intervals. That this verdict or finding was confirmed by the Lord Chancellor.

The evidence in the cause was exceedingly vo-

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1843. luminous, and the case was argued during several
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The *Queen's Advocate* and *Jenner*, in support of
the will.

Addams and *Deane*, contra.

JUDGMENT.

SIR HERBERT JENNER FUST.

This being a case involving the consideration of the sanity or insanity of the party deceased, and consequent legal validity or invalidity of her will; the Court was bound to examine very carefully and minutely into the whole of the circumstances adduced in evidence on the one side and on the other, in order to satisfy itself whether this is or not the will of a capable testatrix.

Now, it is admitted on all hands that, during three periods of her life, Miss Wicks, the deceased, was decidedly insane, in the year 1826, again from November, 1829, until February, 1830, and lastly, from December, 1839, until June, 1841, when she died. Under this state of circumstances it becomes a material inquiry, what was the mental state of the deceased between these respective periods, and more particularly between February, 1830, and the 10th of December, in the same year, during which interval the will in question was made? Now, the great point in this case depends on the admitted natural eccentricity of the deceased, whether it extended to unsoundness of mind in the legal acceptance of the term. This is a point, as to which, in dealing with cases of this nature, the Court always labours under

great difficulty, and the Court has experienced this difficulty in no slight degree in the present case, wherein it is admitted, that at three periods of the deceased's life, she was decidedly insane, and during one of such periods, prior to the commission of lunacy, was under personal restraint. The question arises, what were the periods, in the lifetime of the deceased, when the bounds of eccentricity were passed, when did insanity commence; again, at what times was the deceased remitted from a state of insanity to the former state of mere natural eccentricity?

Now it has frequently been attempted to furnish some general rules which might serve as guides to Courts of law in the investigation and decision of cases of this description; but all endeavours to do so have failed; every case has some distinguishing features; each case must be governed by its own peculiar circumstances. There is one well-known case on this subject, in this Court, which occurred in the time of my learned predecessor—I allude to the case of *Dew v. Clarke* (a). The most elaborate arguments on this subject were there adduced, and the question most thoroughly considered by the Court; the result was, as I understand it, this,—that in all such cases it is absolutely and essentially necessary to look to the peculiar circumstances of each individual case; and to judge from the whole character of the person, whose mental capacity is the subject of inquiry; what was the state and condition of the mind of that individual; not only with

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(a) 3 Add. 79; S. C. reported by Dr. Haggard.

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respect to the immediate time at which a will is executed, but at the intermediate stages of his life.

It is impossible, as I have said, for Courts of law to lay down any general rules, but, in the investigation of such cases, much assistance will often be derived from the observations and recorded experience of medical men, who have devoted much time and attention to this malady, and to its attendant symptoms; and I think I cannot, in the present instance, do better than refer to some very sensible remarks which will be found comprised in a small compass, in a Treatise on Medical Jurisprudence by Dr. Ray (a).

Now, in page 129, section 92, of this work, I find the following observations:—

“Mania then being a disease, and governed by the same pathological laws as other diseases, it will be incumbent to give some account of its symptoms and, since we consider a well settled conviction of the above views as having an important bearing on the course of legal decisions, no further reason will be necessary for going more fully into this part of the subject, than at first blush might seem proper for our purpose. So closely are soundness and unsoundness of mind allied that we are met at the outset by the difficulty of discriminating, in some cases, between mental functions modified by disease and those that are peculiar, though natural, to the individual. Madness is not indicated so much by any particular extravagance of thought or feeling as by a well marked change of character, or departure from the ordinary habits of thinking, feeling

(a) Published in the year 1839.

and acting, without any adequate external cause. To lay down, therefore, any particular definition of mania, founded on symptoms, and to consider every person mad who may happen to come within the range of its application, would induce the ridiculous consequence of making a large portion of mankind of unsound mind. Some men's ordinary habits so closely resemble the behaviour of the mad, that a stranger would be easily deceived ; as in the opposite case, where the confirmed monomaniac, by carefully abstaining from the mention of his hallucinations, has the semblance of a perfectly rational man. Hence, when the sanity of an individual is in question, instead of comparing him with a fancied standard of mental soundness, as is too often the custom, his natural character should be diligently investigated, in order to determine whether the apparent indication of madness, is not merely the result of the ordinary and healthy constitution of the faculties. In a word he is to be compared with himself, not with others, and if there have been no departure from his ordinary manifestations, he is to be judged sane ; although it cannot be denied that striking peculiarities of character, such as amount to *eccentricity*, furnish strong ground of suspicion of predisposition to madness." [Dr. Ray then refers, in confirmation of these views, to certain published observations of Dr. Gooch and Dr. Combe on this subject.] "In investigating the nature of insanity, the first caution to be observed is not to confound disorders of mental functions with natural qualities, which sometimes strongly resemble them. Many men, in the full enjoyment of

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health, are remarkable for peculiarities and idiosyncrasies of thought and feeling, which contrast strongly with the general tone and usages of society; but they are not, on that account, to be held as insane because the singularity for which they are distinguished is, with them, a natural quality, and not the product of disease; and from the very unlikeness of their manifestations to the modes of feeling and acting of other men, such persons are, in common language, said to be eccentric. It is true that on the principle already explained, of excess in size of some organs over the rest being favourable to the production of insanity, eccentricity involves, all other things being equal, a greater than usual susceptibility to mental derangement; but still it is not mere strangeness of conduct or singularity of mind which constitutes its presence. *It is the prolonged departure, without an adequate external cause from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of disorder in mind*; and the degree at which this disorder ought to be held as constituting insanity, is a question of another kind, on which we can scarcely hope for unanimity of sentiment and opinion. Let the disorder, however, be ascertained to be morbid in its nature, and the chief point is secured, viz., a firm basis for an accurate diagnosis because it is impossible that such derangement can occur unless in consequence of, or in connexion with a morbid condition of the organ of mind; and thus the abstract mental states, which are justly held to indicate lunacy in one, may, in another, speaking relatively to health, be the strongest proofs of p=

fect soundness of mind. A brusque rough manner, which is natural to one person, indicates nothing but mental health in him ; but if another individual, who has always been remarkable for a deferential deportment and habitual politeness, lays these qualities aside, and without provocation or other adequate cause, assumes the unpolished forwardness of the former, we may justly infer that his mind is either already deranged, or on the point of becoming so. Or, if a person who has been noted all his life for prudence, steadiness, regularity, and sobriety, suddenly becomes, without any adequate change in his external situation, rash, unsettled, and dissipated in his habits, or *vice versá*, every one recognises at once these changes, accompanied as they then are by bodily symptoms, as evidences of the presence of disease affecting the mind, through the instrumentality of its organs. It is, therefore, not the abstract act or feeling which constitutes a *symptom* ; it is *the departure from the natural and healthy character, temper, and habits* that gives it this meaning ; and in judging of a man's sanity, it is consequently as essential to know what his habitual manifestations were, as what his present symptoms are."

According to this learned writer, these are tests which may be well applied in the investigation and determination of a question, whether eccentricity has so exceeded its bounds as to verge into unsoundness of mind ; and the result seems to be, that the same acts which would constitute insanity in one eccentric individual, might not do so in another ; for the reason that the minds and habits of the two persons might be differently constituted.

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The Court then proceeded to consider
dence in the cause, and finally arrived at
clusion, that the will should be admitted to
The costs of all parties to come out of the e

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BUTT *against* FELLOWES.

Objection to a
church-rate.

1st, That a sole
churchwarden
was not duly
elected.

2nd, That,
by reason of
such undue
election, a no-
tice signed by
the churchwar-
den, calling the
vestry for mak-
ing the rate,
was an invalid
notice.

3rd, That a
church-rate
was excessive.
Objections
overruled.

A church-rate
is not excessive,
if made for de-
fraying the ex-
penses of and
for the current
year, although
such expenses
may have been
incurred before
making the
rate.

Semble. Notice of a vestry meeting, for making a church-rate, may be given
parishioner.

THIS was a cause of subtraction of chur
promoted in this Court, by virtue of letter
quest, by Mr. Butt, as churchwarden of th
of Sandiacre, in the county of Derby, and
of Lichfield, against Mr. Fellowes, an in
and parishioner.

The libel pleaded Article one,—That,
year 1839, the parish church of Sandia
in need of repairs; that, on the 28th o
in that year, the then sole churchwarden,
parishioners met in vestry, pursuant to a
legal notice, being a special notice of the
for which the vestry was summoned; that
fivepence in the pound, having been mo
seconded, an adjournment was moved and s
and a show of hands appearing to be in f
the amendment, a poll was demanded, and t
the 5th of July, when fifty-two votes being

favour of the rate, and no vote against it, a rate of **five** pence in the pound was carried unanimously.

Article two: exhibited a copy of the notice which **specified** minutely the repairs for which the rate **was** required, and it alleged, that the notice had **been** duly given, pursuant to the act of 1 Vict. c. 45.

Article three: that, at the time of making the rate, **Mr.** Fellowes was an inhabitant of the parish, occupying lands of the yearly value of 63*l.*, and was **rightly** and equally assessed to the rate in respect **thereof**.

Article four: pleaded the entry in the rate-book.

Article five: that Mr. Fellowes had frequently **been** requested to pay this rate, and had refused.

Article six: that Mr. Fellowes had been summoned **before** two of the Justices of the Peace for the county of Derby, in respect of this rate; that he, on being **so** summoned, objected to the validity of the rate; **that** the Justices were, by reason thereof, unable to **adjudicate** on the rate, and the question of its validity **was** adjourned to this Court.

Article seven: that Mr. Fellowes was and is subject **to** the jurisdiction of this Court.

Article eight: that Mr. Butt, at the time of making the rate, was sole churchwarden of the parish of Sandiacre.

This libel having been admitted, an allegation in answer was given in, on behalf of Mr. Fellowes, pleading.

Article one: that a Mr. Richard Salt acted **as** sole churchwarden of this parish during the year 1838, up to the month of July in that year. That, in the said month of July, a meeting of the parishioners was, in fact, held at a public-house in

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the said parish (but not pursuant to any legal notice) on the subject of the affairs of the parish. That differences having arisen, the meeting prolonged its sitting, from about six or seven o'clock in the evening, until about two in the following morning. That, in the course thereof, the said Richard Salter threw the parish books on a table, and said "he would be churchwarden no longer; that William Butt (the party promoting the suit) might take the books, and be churchwarden in his stead." That William Butt, from such time assumed to be, and acted as, sole churchwarden of the parish, and ordered repairs and alterations in the church and churchyard.

Article two: That on Sunday, the 24th of March, 1839, (the same not being Easter Sunday, a notice was affixed on the door of Sandiacre Church, as follows:

"Notice is hereby given, that a public meeting will be held at Mr. Young's, on Thursday, the 28th of March, at seven o'clock in the evening to appoint a guardian, and other officers for the ensuing year. (Dated.) Sandiacre, March 24th 1839. (Signed.) Joseph Stevens, Overseer."

That such meeting was held on the 28th of March, pursuant to such notice, and to such notice only; that the said William Butt was elected, (elected at all,) churchwarden of the said parish of Sandiacre for the year 1839. That guardians and churchwardens are not used in the said parish, in differently for one and the same officer, but that the offices are separate and distinct, and, that pursuant to such notice, a guardian was duly elected. That when Mr. Fellowes (party in this cause), w-

before the magistrates, on the summons for the non-payment of the rate sued for in this cause, the said William Butt, in support of such summons, stated, upon oath, that he had been regularly appointed churchwarden at a vestry meeting, held on the 28th of March, 1839; and also produced to the magistrates either the original, or a copy of the notice, pursuant whereto the vestry meeting was held.

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Article three: That the pretended vestry meeting, for making the rate sued for, was not held pursuant to any due or legal notice, such notice having been signed or subscribed by the said William Butt only.

Article four: That the pretended rate was, in fact, made in order to defray expenses of which the greater part had then been already incurred, (although not by the parish) many of which had in fact been incurred previous to Easter, 1839, as, amongst others, for repairs to a road leading to the church doors, and to the church wall; which were all completed before Easter, 1839. That, at the pretended vestry for the making thereof, the said W. Butt stated, that he wanted 40*l.* to pay for alterations previously made, and 23*l.* to complete such alterations; and he refused to produce any bills for the work done, or to furnish any estimate for the proposed works.

Article five: That at the pretended poll, upon or in respect of the pretended rate, the said W. Butt, provided a quantity of beef and ale, and openly, and publicly declared, that they were for those who voted for the rate, and that, rather than be beat, he would stand or furnish, at his own ex-

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pense, a cask of gin; and that on any poor parish ioner polling for the rate, the said W. Butt, in most or many instances, gave him a ticket entitling the bearer to partake of the beef and ale (a).

This allegation having been admitted, an allegation in reply was given in, which pleaded, Article one: (in contradiction to the first Article of the last allegation,) That the meeting of the parish ioners of Sandiacre, in the month of July, 1838 was a vestry meeting duly convened by the overseer sending round a person to the houses of the principal parishioners and rate-payers of the said parish, on the morning of the day on which the said meeting took place, and leaving a verbal notice, "that a vestry would be held at the Red Lion public-house, that evening, for the purpose of auditing and passing the churchwarden's account, and electing a new churchwarden." That such had been the mode of summoning all vestries in the said parish from time immemorial. That at such meeting Richard Salt did not throw any books on the table, nor express, nor conduct himself in the way alleged; that he had served the office of churchwarden for four successive years; that he wished to resign, and did resign. That his accounts were duly audited and passed. That a parishioner proposed, and Richard Salt seconded the nomination of Mr. Butt as churchwarden for the ensuing year. That no other person was proposed for the office, and Mr. Butt was thereupon unanimously and duly elected churchwarden, and

(a) The admission of this Article was opposed, on the ground, that if proved, it could not invalidate the rate. The Court admitted it, having a bearing on the costs of the suit at the hearing.

on the following day, accompanied by Mr. Salt, went to the visitation at Derby, and was duly admitted sole churchwarden for the said parish.

Article two: (in contradiction to the third Article of the last allegation,) That at the vestry meeting, held at the Red Lion public-house on the 28th of March, 1839, it was duly proposed and seconded, that Mr. Butt should continue in the office of churchwarden for such year; that the motion was carried unanimously, no other person being proposed, and that, in the month of July, Mr. Butt was again duly admitted and sworn into the office of churchwarden.

Article three: (in contradiction to the fourth Article of the last allegation,) That the said rate, made on the 5th of July, 1839, was made solely for purposes specified and set forth in the notice for making such rate, and for no other purpose whatsoever; and that the whole of the repairs and alterations specified in the notice had been ordered and directed to be done, and that William Butt, as churchwarden of the parish, had been monished and directed to do and make the same, by the Rev. Mr. Hey, rural dean of the deanery in which the parish of Sandiacre is situate, after a personal survey or inspection of the church and churchyard.

Article four: That although Mr. Butt had, previously to asking for the rate, caused various repairs to be made which were necessary for protecting the churchyard from desecration, and had also improved the approach thereto, yet that he wholly defrayed the expenses of all such repairs from his own pocket, and no part of the expenses hath ever been defrayed

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out of the proceeds of any church-rate, made in or upon the parish.

Article five : (in contradiction to the fourth Article of the last allegation,) That Mr. Butt stated at the vestry meeting, at which the rate was made, that he should require the rate for the purpose of the repairs and alteration specified in the notice and which repairs and alterations he then stated to have been ordered, by the rural dean, to be done and also for the usual incidental expenses of the church. That Mr. Butt never did refuse to produce his bills against the parish, but he did state that he had no bills against the parish, meaning thereby, that he made no demand on the church-rate for any expense previously incurred. That no estimate was demanded by any person at such vestry, in relation to the rate then proposed to be made.

Article six : (in contradiction to the fifth Article of the last allegation,) That the parish of Sandiacre is of considerable extent, and many of the parishioners had come from a distance of between two and three miles to attend the vestry, and Mr. Butt did, at his own cost, provide bread and meat and some ale at a public-house, but not with reference to particular persons, or with the view of influencing them in their votes. That many persons who partook of such refreshment were persons of wealth and consequence in the parish; that others were persons who neither resided in the parish nor voted, nor were entitled to vote on the question of the rate; that the total amount of the cost of such refreshment was one pound fifteen shillings.

Publication having passed, the cause was argued,
by,

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Haggard and Harding for the churchwarden.

BUTT
against
FELLOWES.

Addams for Mr. Fellowes.

JUDGMENT.

SIR HERBERT JENNER FUST.

This is a suit for subtraction of church-rate, promoted by Mr. William Butt, one of the churchwardens of the parish of Sandiacre, in the county of Derby, diocese of Lichfield, against Mr. Fellowes, a parishioner and rate-payer of that parish.

The sum in dispute, between the parties, is, 1*l.* 6*s.* 3*d.*; the rate sued on, was made on the 5th of July, 1839. The proceedings in this cause commenced in the month of March, 1841, the party defendant having been summoned before two justices of the peace on the 22d of May, 1840.

[The Court then stated the proceedings in the cause.]

By the libel, which is proved by the witnesses examined upon it, it appears, that a vestry meeting was held in this parish of Sandiacre, on the 29th of June, 1839, pursuant to a notice, which is annexed to this libel; that a rate was proposed; that every article of the repairs purposed to be done to this church, was specifically set forth in the notice; that an amendment was proposed; the vestry adjourned, for the purpose of a poll being taken; and the rate afterwards carried by a majority of votes, taken at a poll, on the 10th of July following,—

CASES DETERMINED IN THE

indeed, carried without any dissentient vote having been recorded against the rate.

Now the notice of holding the vestry is as follows:

"Notice is hereby given, that a vestry meeting will be held in the parish church of Sandiacre, on Friday, the 28th day of June, next, at eleven o'clock, in the forenoon, for the purpose of granting a church-rate, at fivepence in the pound, for defraying the necessary expenses of the church, and extending the churchyard wall round to Mr. Stanley's garden-hedge, for spouting the south side of the church, and for taking away the soil from the north and south sides, to prevent it being so damp, and also for two casements, one to be put in the south, and the other in the north windows, to ventilate the same.—(Signed) William Butt, churchwarden, June 22d, 1839."

Now it is proved,—indeed it never was denied, that this was the notice for holding the vestry meeting, at which this rate was made; but yet this Court has been required to go into the whole of the evidence on this point, because it involves all the circumstances under which Mr. Butt became the churchwarden of this parish; the result of the evidence, as to Mr. Butt's election, is, that Mr. Fellowes, the party opposing the rate, has confused two of the meetings in this parish; he has mistaken what took place at a vestry, in an early part of the year 1838, for what took place when Mr. Butt was first elected churchwarden, at the meeting at the Red Lion public-house, in the month of July, 1838; Mr. Salt has completely disproved the first Article of the allegation of Mr. Fellowes.

It has been admitted in argument, that a great

portion of this case depends on what took place at that meeting in July, for from that time Mr. Butt began to act as churchwarden ; and I think, also, it was admitted, that Mr. Salt does disprove the account of what took place at such meeting, as stated in the first Article of Mr. Fellowes's allegation ; Mr. Salt deposes,—“That he was sole churchwarden of this parish, up to July, 1838, that in that month he gave up the office, and Mr. Butt took it for the remainder of the year ; that he gave it up at a meeting, held at a public-house in the parish ; that he had previously determined to give up the office, and called the meeting, in order to give it up, and pass his accounts :—he says,

“ I put up a notice on the church-door,—calling the meeting, but not, as I best recollect stating in the notice, what the object of the meeting was. There were no differences at the meeting ; according to my recollection, it is not the fact, that at this meeting, I threw the parish books on the table, and said, ‘ I would be churchwarden no longer, but that Mr. Butt, if he pleased, might take the books, and be churchwarden in my stead ;’ nothing of the sort took place at the meeting in question ; there had been a stormy meeting in the parish, in the January before, which was kept up to a very late hour in the morning, and at which differences took place between Mr. Butt, and some of the parishners ; and that meeting, I suppose, has been confounded with the meeting, in July, when I gave up office. That meeting,—the one in July,—was quite peaceable ; it did not, I think, last later than seven to about ten o'clock, as I best recollect. Previous to it, Mr. Butt and I had talked the mat-

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ter over as to my giving up the office of church-warden, and he had partly agreed to take it, and at the meeting, I declared my intention of giving it up, and then it was arranged that Mr. Butt should take it; it was all done as peaceable as possible at the meeting. I did not give up the books at the meeting; I took them back home with me, and gave them up to Mr. Butt, some time after. On the day after the meeting I went over with Mr. Butt to Derby, and he was initiated as churchwarden of Sandiacre. Directly Mr. Butt became churchwarden, he commenced laying out money in repairing the church, altering the churchyard, and such like."

Now this witness is produced to prove the first Article of the allegation of Mr. Fellowes, he is the party's own witness; it is quite clear that this first Article of the allegation is not true; the meeting was called, by a notice, which Mr. Salt himself put up on the church-door,—a notice, that a vestry would be held; and a meeting was accordingly held, when Mr. Salt gave up his office, on a condition, or arrangement that Mr. Butt should be churchwarden for the year ensuing; that Mr. Butt was elected or admitted, without any opposition to his election, into the office of churchwarden for the remaining part of the year 1838, and part of 1839. This meeting was regularly called, by affixing a notice on the church-door. It appears by the whole of the evidence in the cause, and examining the books of the churchwarden's counts, and appointment of new churchwardens that parties once elected continue in office by consent, if not actually re-elected, until they c

to retire, or are dismissed. [The Court read certain entries from one of the parish books, produced in the cause, in order to show the practice prevailing as to electing churchwardens.]

A meeting, in July, 1838, is called by Mr. Salt, he wished to resign, and he resigns the office of churchwarden; his accounts are audited; and Mr. Butt was appointed churchwarden, and was on a subsequent day presented to the archdeacon, at the visitation, and sworn in to the office. Here then is *prima facie* evidence of Mr. Butt being churchwarden, and the first act he does, is to improve the church and churchyard; he altered the road leading to the church; he put up some gates; repaired an old door, and removed it to the porch of the church, where there had been previously only a gate, and this gate in so bad a state that cattle were enabled to get into the porch of the church.

I think the appointment of Mr. Butt to be churchwarden, was quite sufficient to justify him in executing such duties. Without resorting to cases or authorities, he was churchwarden, *de facto*; it is for the other party to make out his case; he must shew, to the satisfaction of the Court, that Mr. Butt was not duly appointed; Mr. Butt clearly was acting as churchwarden, *de facto*, there was quite sufficient an appointment to enable him to discharge such duties as these.

Thus matters remained in this parish until March, 1839, when a public meeting of the parishioners took place, at which it was proposed, that Mr. Butt should be churchwarden for the ensuing year, this was seconded, and agreed to unanimously; this appears on the minutes entered in the parish book,

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which was brought before the Court, on the motion of the proctor for Mr. Fellowes.

Now it has been said, that Mr. Butt was not legally appointed to this office, inasmuch, as the notice to call this meeting was signed, not by Mr. Butt, as churchwarden, or by Mr. Salt, as churchwarden, but by Joseph Stevens, as overseer. [The Court read the notice, *ante*, p. 682.] It is admitted that the vestry meeting was called, and met in pursuance of this notice, and, that at such vestry, Mr. Butt was elected churchwarden, but it has been contended, that this is not a notice for the election of a person for the office of churchwarden, in this parish; that the word is *guardian*, and that guardian is not synonymous with churchwarden; admitting that to be so, this notice is to elect a guardian and other officers; and it has been proved, that at this meeting, thus called, not only was a guardian of the poor appointed, but also, overseers of the poor, a constable, and a surveyor of highways. At this meeting, Mr. Butt was elected into, or continued in the office of churchwarden;—for, as I have before remarked, it appears, by the book produced, that having once acted in the office, he could only be dismissed from it by resignation, or election of another person; at all events, it seems, he would remain three years in office.

I am of opinion that this was a legal notice; it might have been more regular if it had been to elect “a guardian, a churchwarden, and other officers;” but I must look to what has been the custom in this parish, which is, that when a party has acted in the office he is to continue, unless he resigns, or the parish elect somebody else. Now the

evidence of Mr. Stevens shews, that the course of electing officers has been as I have stated; upon the first article of Mr. Butt's allegation, he says,

"I was an inhabitant of the parish of Sandiacre from 1831 down to 1841; I was one of the overseers of the parish during the year ending Lady-day 1832, and again during two years ending Lady-day 1838, and 1839. I heard, at the time, of the parish meeting held at Sandiacre in the month of July, 1838, at the Red Lion public-house, at which meeting Mr. Butt was first appointed churchwarden, but I was not present at that meeting. I did not convene the meeting myself, I believe, that the same was convened by Mr. Salt, the then churchwarden, in the mode in which meetings of the kind were usually summoned, during my knowledge of Sandiacre. Such meetings, which were considered vestry meetings, were usually so summoned and convened, during such time, by the churchwarden, after he had been in office twelve months, or longer, sending a person round to the principal rate-payers, and to the persons who were in the habit of attending the parish meetings there, to say that the meeting would be held at a certain time and place, which was frequently in the evening of the same day on which the notice was given, and usually at the Red Lion inn; and to intimate that the churchwarden would then give up his accounts, and that the rate-payers and parishioners must attend and appoint a fresh churchwarden; such notice was merely a verbal one. I believe that Mr. Salt had at that time served the office of churchwarden for several years."

Upon the second Article, "I was present at the vestry meeting held on the 28th of March 1839; it

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was, on that occasion, proposed by Mr. John Sheets, the elder, a resident parishioner and rate-payer in the parish, that Mr. Butt should continue in the office of churchwarden for the then existing year; such motion was then carried unanimously, without one dissentient voice that I heard; I was present throughout the whole of the meeting. I am certain that no other person was proposed as churchwarden for the ensuing year at such vestry meeting: had any other person been proposed I should have heard of it. Overseers of the poor, a guardian of the poor, and a surveyor of the highways were also appointed at the said meeting, and the quarterly accounts of the said parish were then examined. I have no doubt that Mr. Butt afterwards went to the visitation at Derby for the purpose of again being duly admitted as churchwarden of Sandiacre, after his re-election to that office."

To the fourth interrogatory. "Upon my oath such had been the mode of summoning all vestries in the said parish from time immemorial, such was the mode of summoning then from long before the time when I was born. Upon my oath it is not the fact, that although meetings of the parishioners had in fact been sometimes so called to consult about the highways, the relief of the poor, and other such subjects, yet that such were not meetings at which matters relative to the church were usually transacted. I will swear, that churchwardens were elected at meetings of the parishioners so convened. I will swear, that church-rates were usually, if not invariably, made at meetings so convened."

To the seventh interrogatory. "I know that the producent was elected churchwarden for the year

1839, at a public meeting of the parishioners of that parish, in fact held at the Red Lion public-house, in the evening of Thursday the 28th of March. That meeting was convened on the previous Sabbath day. Upon my oath it was not duly convened by the overseer sending a person round to the houses of the principal parishioners and rate-payers of the said parish on the morning of the day on which the meeting took place, and leaving a verbal notice, that a vestry would be held at the Red Lion public-house, and thereto adding for what purpose it would be held, although such had been the mode of summoning all vestries of the said parish from time immemorial; it was, on the contrary, convened by fixing a notice on the door of the church. I signed the notice as overseer and fixed it up myself."

It was at this meeting so held, that the continuation of Mr. Butt in the office of churchwarden was proposed and carried unanimously.

Now upon this evidence I am not prepared to say, that Mr. Butt was not legally elected churchwarden in 1839; or even in 1838; and if so, and if he continued in office until a new churchwarden was sworn in by the archdeacon, I am of opinion, that his election has not been shewn to be illegal; but on the contrary, looking to all the circumstances of the election in this parish in 1838, and that he was duly admitted in 1839, and sworn in, I think this gets rid of the objection to the rate; because the objection is, that Mr. Butt was not duly elected; that the notice for making the rate was not duly signed; that the parties went away because they thought Mr. Butt's election was illegal, and therefore the notice given by him was not legal; and the

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vestry not duly summoned. If the election was not a valid election, and if the notice was signed by Mr. Butt, or by any other individual, would a rate made in vestry be therefore illegal? I am not aware that it is absolutely necessary, that a vestry meeting for making a church-rate should be called by the churchwarden; that it may not be called by a parishioner who is not a churchwarden: suppose Mr. Salt had continued in office, and had died, who could in such case have called a vestry meeting? suppose Mr. Salt had been too ill to call a meeting, would a meeting called by another parishioner be illegal? I know of no law which makes it essential that a vestry meeting should be called by a churchwarden.

In the case of *Dawe v. Williams (a)*, it is certainly said, "that vestries for church matters are regularly to be called by the churchwardens, with the consent of the minister." No doubt the churchwardens are the proper persons to call such a meeting, but that case does not establish, that, if any other person calls a vestry, it is not a legal meeting. That was a case of a proceeding, by articles, against a parishioner, for reading a notice for a vestry meeting during divine service, without due authority. The criminal charge did indeed contain an averment, that the defendant had, on a certain Sunday, during the time of divine service in church, he not being a churchwarden, overseer, or officer of the parish, entered the porch of the church, and affixed on the doors of the church a written notice, to this effect: "Take notice, that a vestry will be

(a) 2 Add. 130. See p. 139.

held in this church on Friday next, at three o'clock, to choose new churchwardens in the place of the present;" this purported to be signed with the names of the churchwardens and overseers. But this was not all,—the material part of the charge follows: "That he, the said H. Williams, then entered the said church, accompanied by Adam Morton, an inhabitant of the said parish, and, having taken his seat with the said Adam Morton, in his pew, did, during the time of divine service therein, and immediately after the Rev. Charles Lacy, the minister then officiating in the said church, had concluded reading the Nicene creed, stand up in the said pew, and, not regarding the sacredness of the place in which he then was, and without any lawful authority whatever, did, irreverently, read aloud a notice, in the words, or to the precise effect, of the said written notice, so affixed, as aforesaid, on the door of the said church,—and did, moreover, then and there, irreverently and indecently chide and brawl, in the presence and hearing of the congregation then assembled in the said church,—and did, thereby, and by so reading aloud the said notice, as aforesaid, interrupt the performance of divine service, create a great disturbance in the said church, and give great offence to the congregation assembled therein."

Sir J. Nicholl held, that a parishioner had no right, during the time of divine service, and of his own authority, to publish such a notice—or, indeed, any other notice—in *the church*. I am not aware that, in that case, the Court held, that a vestry meeting called by any other person than a churchwarden would be illegal in itself: I think

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the inference drawn from that case arises upon a misunderstanding of the law there laid down.

This was a rate carried by vote. Mr. Butt, who called the meeting, was churchwarden *de facto* and, as I think, *de jure*.

Another objection to the rate is this:—That this rate was made at a time, after certain works had been done by order of Mr. Butt, before he was admitted into office, in 1839, and it has been contended, that this rate was intended to cover that expense, and it has been argued, under the authority of *Chesterton v. Farlar* (a), to be retrospective and excessive, because made for a larger sum than was wanted for the repairs directed to be done by the rural dean.

Now the Rev. Samuel Hey, the rural dean, has been examined; he states, that he visited this church and churchyard on the 13th of June, 1839; he says, "I found them in the most wretched condition, and I saw Mr. Butt, the then churchwarden of Sandiacre, and I recommended and directed him (I have not the authority to order or monish him) to have certain repairs and alterations done and made. The roof was not waterproof, and I found the rain fell through into the interior of the church. [The rural dean specified the defects.] The notice, (June 22nd, 1839,) now produced to me, is a correct and fair specification of what I directed Mr. Butt to have done. I strongly recommended him, as churchwarden, and urged him to have it done."

Here, therefore, the rural dean directed certain repairs to be done; and the notice, calling a

(a) 1 Curt. 364; 2 Moo. P. C. C. 335.

vestry for making a rate to defray the expense of the repairs, specified what those repairs were to be, and, therefore, what was done under those circumstances, was, I think, properly done. The repairs were done after Mr. Butt had been sworn into office. The objection, however, is, that certain other expenses had then already been incurred for previous repairs; but still even these were repairs for the accommodation of the parishioners, such as appear to me to be absolutely necessary. They clearly come within the range of the duties of a churchwarden; and, therefore, the only question (all these being necessary repairs) is, supposing Mr. Butt had made a rate for such purposes, or for defraying such expenses, whether it would be a retrospective rate? and, if retrospective, whether excessive? Now, if this is to be made an objection, I think the particulars in which the excess consists should be specified. I find, on inspecting the balance of the accounts of Mr. Salt, that he had not collected the whole of a previous rate, and had been unable to collect it. Now, if there was any part of a previous rate uncollected, there might have been—I do not say there would—from that source, from that uncollected rate, sufficient to defray the expenses of the repairs made before Mr. Butt was elected churchwarden, in 1839,—I am not now considering the fact that he was previously serving the office *de facto*. All that was done, as respects the repairs, seems to me to have been properly done, and to be the proper subject of a church-rate; but I am now considering the question as from the time when Mr. Butt's formal election took place, namely, from March, 1839. I am not

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quite able to make out, from Mr. Salt's balance, what was the amount actually collected by him, or what was paid over by him on account of the parish. It may be very true, that the balance of evidence may be the other way, but, if the statement on behalf of Mr. Fellowes be correct, namely, that Mr. Butt did say, that he should require a sum of 40*l.*, to pay for expenses already incurred, and 23*l.* for making the alterations;—taking the balance of the evidence to be so,—is it, on this assumption, shewn that the rate is excessive; that it is more than sufficient to defray the expenses ordered by the archdeacon?—if not, surely, the rate is not invalid, as being a retrospective rate.

If the rate be excessive, the excess should be shewn; the principle on which this depends, was decided in *Chesterton v. Farlar*. A church-rate was objected to on the ground that it was an excessive rate; and it was held to be so. There was an appeal from this decision to the Judicial Committee of the Privy Council. The judgment of that Court was delivered by the learned Chief Judge of the Court of Bankruptcy; he says, (a)—“ Now, it is here admitted and alleged by the churchwardens, that the rate in question was expressly and avowedly made for the purpose of providing, not only for the expenses of the current year,—to all of which their Lordships are of opinion it might be legally applied, whether incurred before or after the making of the rate,—but also for the liquidation of outstanding demands against the parish, incurred during former years, that is to say, for the repayment to the

(a) 2 Moo. P. C. C. p. 339.

guardians of the poor of the sum of 265*l.*, borrowed from them in the year 1832, and of a further sum of between 2000*l.* and 3000*l.*, being the amount of debts incurred by the parish in former years.

Their Lordships are of opinion, that this allegation is not only not admissible, as presenting any answer to Mr. Farlar's defence, but that the facts alleged in it afford a complete answer to the whole suit, by establishing the illegality of the rate. It is true the rate is good upon the face of it, and it is also true that such a rate would not be vitiated, although one of its objects might have been to reimburse the churchwardens for expenses incurred by them during the current year.

This was admitted in the case of a poor-rate in *Tawney's case* (a) and a similar rule has been applied to the case of church-rates. *Rex v. Chapel-wardens of Haworth* (b), *Rex v. Sillifant* (c), and *Lanchester v. Fricker* (d).

But the main object of this rate is to repay money borrowed, and to pay debts incurred in former years; and though the defect does not appear upon the face of the rate as it did in the case of *Rex v.*

Wavell (e) and *Tawney's case*, yet where a rate upon the face of it purports to be what it really ought to be, a rate for the expenses of the current year, but is made for a sum avowedly larger than is necessary for that purpose, with a view to enable the churchwardens, out of the monies levied, to pay off debts incurred in former years—the rate becomes excessive, and therefore illegal, according to the prin-

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(a) 2 Salk. 531. (b) 12 East, 556. (c) 4 Ad. & Ell. 354.

(d) 1 Bing. 201. (e) Douglas, 116.

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ciple laid down by Sir G. Lee, in *Brettell v. Wilmott and King* (a).

It must be shewn that a rate is excessive. What is there to shew to me that the sum of 63*l.* is more than sufficient to defray the expenses of the current year between the months of March and June? If the rate is excessive, the excess must be shewn; it is not the possibility or the probability that the money collected will be misapplied, which makes a rate excessive; and there is nothing here to shew what, in the sum demanded, is beyond what is required for the expenses of the current year.

I think the Court is entitled—I think Mr. Butt is entitled, to have it satisfactorily proved, that the rate is excessive; and not a mere assertion that it is more than sufficient to meet the expenses of the current year, that is, between March, 1839, and March, 1840.

Under all these circumstances, I think this rate is a valid rate, and that Mr. Butt is entitled to payment of this sum, unless it be shewn to be excessive; if the rate be not excessive in itself, it does not become an illegal rate merely because a churchwarden may intend—a fact not to be presumed—to repay himself out of it, expenses incurred in a previous year.

There is, however, a circumstance, which I am sorry to see in any case; I allude to the account of the treating, it certainly does appear that many of the poor persons of this parish who voted in favour of the rate were refreshed; I say, that this is a circumstance which the Court is sorry to see; but it

(a) 2 Rep. t. Lee, 548.

does not necessarily vitiate the rate ; but still the Court cannot see such a practice taking place in a parish without expressing its disapprobation of it.

I think this rate is a valid rate in itself, and that Mr. Fellowes is liable to pay it ; but I am not prepared to say, that I shall condemn him in the whole of the costs ; in some part I necessarily must condemn him.

[On being informed that the plaintiff's costs would amount to about three hundred pounds, the Court condemned Mr. Fellowes in the sum of 75*l.* *nomine expensarum.*]

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The Office of the Judge promoted by
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ON the 20th day of May, 1843, a decree, founded on letters of request from the Bishop of Ely, issued from this Court, citing the Reverend William Herbert Chapman, clerk in holy orders, rector of Basingbourne, in the county of Cambridge, to appear, and answer to certain heads, positions, or interrogatories, and more especially, for having within the said diocese of Ely, offended against the laws ecclesiastical, by refusing a second time, to wit, on the 26th day of May, 1841, being within two years from the date of these presents, to bury the corpse or body of Jane Rumbold, spinster, (an

3 & 4 Vict. c. 86, s. 20, enacts, "That every suit against a clergyman, for any offence against the laws Ecclesiastical, shall be commenced within two years from the commission of the offence."

On the 17th of February, 1840, a clergyman refused to bury a corpse of a parishioner brought for interment ; on the 26th of

May, 1841, a second request to him to do so was made, and refused. On the 20th of May, 1843, a citation issued against him from this Court. Protest to appearing, on the ground, that the two years, limited by the Act, had expired, overruled.

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infant) a parishioner of the parish of Basingbourne aforesaid, when duly applied to on that behalf, after convenient notice or warning given on both occasions, (the first whereof occurred on or about the 17th day of February, 1840,) without any just or sufficient cause on either occasion.

The party cited appeared under protest, by reason, "That the 20th section of the 3 & 4 Vict. c. 86, provides, that every suit or proceeding against any clerk in holy orders, for any offence against the laws ecclesiastical, shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards." That by the first refusal, in February, 1840, the said offence, if any, was complete, and that the time limited by the said act, for proceeding in such case, expired before the service of the said citation.

The matter of protest came on to be argued.

Phillimore, in support of the protest. The citation is not sufficiently clear and explicit; precision is essential to every process of this nature; on the face of the citation two offences appear, *non constat*, on which the promoter intends to found; it may be intended to proceed on both, *Digest*, lib. 44, Law 3, *Gail's Obs.* 154.

Harding, (same side.)—All offences against clergymen, for ecclesiastical offences, are now regulated by the 3 & 4 Vict. c. 86, the Church Discipline Act; and the time within which such proceeding must be commenced is limited, by the 20th section, to two years. The first refusal, in

this case, was in February, 1840, the citation is not issued until the 20th of May, 1843; upon the first refusal the offence was complete, and the statute began to run; the offence is of a nature which cannot be legally repeated with reference to the same object. A demand and refusal are evidence of conversion in trover, but if every fresh demand and fresh refusal operated as a new conversion, how could there ever be any limitation in an action of trover? If the offence be in its nature single, repetitions of it are not fresh offences, *Cripps v. Dearden* (a), *Anon.* (b). The principle of construction, applicable to this case, has been decided in the analogous cases of statutes of limitation at common law. *Godin v. Ferris* (c), *Crook v. M'Tavish* (d), *Wordsworth v. Harley* (e), *Lloyd v. Wigney* (f), *Fraser v. Swansea C. C.* (g), *Saunders v. Saunders* (h).

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The *Queen's Advocate* and *Addams*, contra.

The 68th canon creates this offence, which not only by virtue of the canon, but from its own nature, is a continuing offence; it is a public scandal existing in the parish; the wrongdoer being the minister of that parish. If the argument on the other side be correct; if a party has committed an offence, and accidentally, no proceedings have been taken against him within a limited time, he becomes *immunis* as respects that offence. In

(a) 1 Smith's L. C. 384.

(b) 3 Dyer, 3236.

(c) 2 H. Blac. 14.

(d) 1 Bing. 167.

(e) 1 B. & Adol. 391.

(f) 6 Bing. 489.

(g) 1 Ad. & Ell. 371.

(h) 2 East, 255.

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a late case, *Sanders v. Head* (a), the R Head had published a very offensive letter addressed to the Bishop of Exeter; now supposed by mere accident, no proceedings had been taken against him, under this Act, within two months of the first publication, why, then, if this argument is to prevail, Mr. Head might have published the same letter in *infinitum*, without being liable to be punished for so doing.

Harding.—That would be an act of commission, not of omission.

SIR HERBERT JENNER FUST.

I have, since the last Court day, looked up the cases and authorities, and have considered the arguments, addressed to the Court, upon the principles and decisions of those cases; the result I have arrived at is this, that in the present case, there is not sufficient to stop the proceedings *in limine*. I am, therefore, prepared to overrule the protest; but I do not think it advisable to enter into a discussion of the principles involved in several cases, because, under the peculiar circumstances of this case, I may possibly be forced to hear the arguments at the hearing, either for the prosecution, or for the defence. I will, therefore, merely state the grounds on which I think I am bound to require an absolute appearance by the party.

This is a proceeding against the Rev. John Chapman, clerk in holy orders of the Church of England and Ireland, rector

(a) *Ante*, p. 565.

rectory and parish church of Bassingbourne, in the county of Cambridge, diocese of Ely, and province of Canterbury; and the charge is, for having offended against the Ecclesiastical laws, by refusing a second time, to wit, on the 26th of May, 1841, to bury the corpse or body of Jane Rumbold, spinster, a parishioner of the parish of Bassingbourne aforesaid, when duly applied to on that behalf, after convenient notice or warning given on both occasions, the first whereof occurred on or about the 17th of February, 1840, and without any just or sufficient cause on either occasion. This is the tenor of the offence which the citation sets forth as the charge against this gentleman.

The question comes before the Court by letters of request, which were presented to, and accepted by the Court, from the Bishop of Ely; and a decree, founded on them, issued, which was returned on the 11th of May in the present year. The second application for the burial of the child was on the 26th of May; the citation, founded on the letters of request, called on Mr. Chapman to answer for having offended against the laws ecclesiastical. (The Court read the citation.) Therefore, the citation recites, that two applications have been made to this gentleman to bury the corpse of a child of one of the parishioners of the parish of which he is rector, and it states his refusal to do so on both occasions, alleging both refusals to be without just or sufficient cause.

An appearance was given to this citation, under protest; the grounds of the protest being, that, according to the true intent and construction of the Act of Parliament, 3 & 4 Vict. c. 86, s. 20,

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the offence was committed and depending on the refusal to the first application, namely, on the 17th of February, 1840; the words of protest are "That it appears on the very face of the citation that the actual offence, if any, was committed without the period prescribed by the limitation of the statute, namely, on the 17th of February, 1840, on which day the wrongful act, if any, must be holden to have been done, according to the true intent and legal interpretation of the statute aforesaid;" this is, the statute limiting proceedings for offences of an ecclesiastical nature; it is known as the Act "For better enforcing Church Discipline; by it, all proceedings of this nature must be commenced within two years after the commission of the offence; therefore, the ground of protest is that the offence was committed in February, 1840 and the citation was not served until May, 1843. If the construction contended for at the bar be the true construction and interpretation of the statute this Court has no jurisdiction to inquire into the offence; but the question for the Court to decide is, whether a fresh offence was not committed by this gentleman on the 26th of May, 1841, consequently, within the period limited by the Act for proceeding against clergymen, for offences against the Ecclesiastical laws, in Ecclesiastical Courts. There is some degree of difficulty on the first appearance of this citation; it recites the application made on the 17th of February, 1840; and it recites that such application was not attended to, namely, that the rector refused to bury the corpse on that day, without reasonable cause; on the first blush of the case, it might appear that it was intended

to proceed against this gentleman for an offence committed in February, 1840, as well as for the offence in May, 1841, this was the doubt and difficulty I felt in the case, not whether an offence was committed in 1841, but whether in truth and fact it was not to be inferred, that it was intended to proceed for both offences. On consideration, however, of the language of the citation, I think that such is not the true construction, for, by the citation itself, the offence is "for having refused a second time, to wit, &c., being within two years." I take this to be the true interpretation of the charge contained in the citation.

Then is this an offence which is capable of being repeated? In that lies the whole strength of the argument in support of the protest. My attention was called, and properly called, by Dr. *Phillimore*, to the language of the citation, as being deficient in clearness, and authorities were stated, and instances adduced from the Digest and other civil law authorities, to shew, that a citation must be clear and specific;—no doubt it must; and I think, on a due consideration of this whole instrument, that the charge is sufficiently clear; and that the party is only called on to answer for the offence, of having in 1841 refused to bury this child; which is an offence within the time limited by the statute. The question really is, was this an offence on the 26th of May, 1841? The whole strength of Dr. *Harding's* argument turns on this; I am clearly of opinion as at present advised, to hold that it is so. It would be, in my opinion, wrong, certainly contrary to anything I have heard, to stop these proceedings *in limine*, at least without having first heard the cir-

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cumstances under which the application to bury this child was made a second time. Dr. *Harding's* argument was founded on cases at common law, actions of trover, trespass, and on the case; I have looked into all the cases cited, and there seems to me to be this distinction, in all these instances the actions arising out of them were limited by act of Parliament, and the question turned on this, from what time the particular limitation by statute began to run; there is no necessity to go into the cases, on principle, when once the cause of suit arises, when that is complete, the statute runs from that time; the only question has been, whether the cause of action was complete at an early period, or at a subsequent time. In the case cited from 2 *East*. 255, (*Saunders v. Saunders*), which was an action of trover for the seizure of certain goods on board a vessel, and where it was objected, that the action should have been brought within three months of the actual seizure; it appeared, that the vessel had been detained, and certain persons put on board her by the detaining party, although the actual seizure was not made until some days afterwards; the action was brought, not from the time of putting the men on board, but from the time when the actual seizure was said to have been made; but, inasmuch as the exercise of authority in taking the possession of the vessel out of the master's hands, and putting it in those of others, it was held, that the actual seizure was complete from the time when the authority was first exercised over the vessel. So in the case of *Godin v. Ferris* (a), an action of trover

(a) 2 H. Blac. 14.

ver, it was held, that the Statute of Limitations runs, not from the time of bringing an action to condemn goods as having been smuggled, but from the time of actual seizure; that being the wrongful act. So in the case of *Wordsworth v. Harley* (a) where, under a road act, a surveyor had taken part of a close into a public road, and had separated it from the remainder of the close, by digging a ditch, and doing a vast variety of other acts, and among others building a wall; in that case, the building of the wall was not actually completed within the time limited for bringing an action; but the Court of King's Bench held, that, when once the wall was commenced, the separation of the property was complete, that the actual wrong doing, by building the wall, was, as one of the Judges expressed it, begun, when the first course of bricks was laid; that act was a complete separation of the property; that was the wrongful act from which the time, within which the action ought to be commenced, began to run. There was another case cited by Her Majesty's present Attorney General, in arguing that cases where the action was against certain surveyors, for undermining a wall, which consequently fell down; but although the act of weakening the wall had been done more than three months before the suit was commenced, yet as the ultimate injury happened within that period, it was held that the plaintiff might recover. So in trover the action accrues from the time of conversion. So in the cases, such as those cited, of the offence of hearing mass, and offences against the game-laws,

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(a) 1 B. & Adol. 391.

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by which unqualified persons are prohibited from going in pursuit of game, an offence is as complete by killing one head of game, as by killing any number, and the killing any number will not multiply the offence, or the penalty; so in another case cited, of a baker offending against an act, by exercising his usual calling on the Lord's day, it was held, that there could not be a separate penalty for every loaf he baked; and the instances there put by Lord Mansfield, that of a tailor sewing on the Lord's-day, every fresh stitch does not constitute a new offence; nor does a shoemaker incur a penalty on every pair of shoes he supplies to customers. In all these cases, in trover, trespass, and action on the case, it must be recollected that the question respects a claim to property between two individuals; that when once the property has been converted the wrongful act is complete; and that the statute runs from the period, when the offence is complete. These suits regard private rights between two individuals; here the offence is a public offence, a public scandal. It must be borne in mind, that the Court knows nothing of the ground for the refusal to bury this corpse; for all the Court can know, the child may have been baptized by a clergyman of the Church of England; by the rector of this very parish himself; the refusal is not for the reason, that the child was unbaptized: but is a general refusal, as to the cause, of which the Court can at present know nothing; from the different dates the Court may perhaps conjecture, that the cause of refusal is of the same description, which occurred in a case which occupied the time and attention of the Court, for several Court days; I allude to the

case of *Mastin v. Escott* (a), if this be so, it may be a reason why proceedings were not instituted during the pendency of that suit; for the same principle would be involved in both cases; I say, this is possible, for it is, at present, mere conjecture.

It seems to me, at present, to be too much to say, that a clergyman may refuse to bury the corpse of a parishioner, and that, because proceedings are not instituted within a certain time, he is to be at liberty to persist in such refusal. The 68th Canon imposes the same punishment for refusing to christen a child, as for refusing to bury a corpse. "No minister shall refuse or delay to christen any child, according to the form of the Book of Common Prayer, that is brought to the church to him upon Sundays or holydays, to be christened; or to bury any corpse that is brought to the church or churchyard, convenient warning being given him thereof, before, in such manner and form as is prescribed in the said Book of Common Prayer; and if he shall refuse to christen the one, or bury the other, (except the party deceased were denounced, excommunicated, *majori excommunicatione*, he shall be suspended for three months." But, can it be said, that if a child be brought to be baptized, and the minister refuses on one Sunday, and it is brought a second time, that a second refusal would not be an offence; I see, at present, no distinction between the two cases;—but, as before said, I will not forestall any arguments, which may hereafter be offered. What is the difference between the two cases? here is a child, for anything that appears,

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(a) 2 Curt. 692.

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properly baptized, over whose body the clergyman of the parish is bound to read the Church burial service: and that child, so far as appears on the citation, is unburied; this is a public scandal; and the wrong-doer, as appears on the citation, is the minister of the parish, whose duty it is to bury the child, and, until that is done, as it appears to me, the offence continues. Something was said as to the length of time between the first and second application; that may be matter proper to be hereafter considered, but I do not think, because the corpse was not brought within a definite or specific time, that, therefore, the minister may refuse to bury it; I do not know that there is any specific time, within which a body is to be brought for interment. I well remember a case, *Gilbert and Buzard v. Boyer*, (a), where the dispute was as to the fees payable for the interment of a corpse, in an iron coffin; the party died on the 2d of March, 1819; proceedings in this Court were not taken until July, 1820; and the sentence of the Judge was not given until May, 1821. Lord *Stowell* recommended that the body, which had, to use his own expression, “remained so long unhonoured,” should be buried, without prejudice, to the right of the parish, as to the fees to be paid.

Therefore, I see no reason in this respect why the rites and service of the church should not have been performed at the period of the second application.

Under these circumstances, as at present advised, on this citation and letters of request, the charge against this gentleman being for having refused to

(a) 2 Cons. R. 333.

Bury this child in 1841, therefore, within the period of two years limited by the act of Parliament; although there is a recital, that the party had in the first instance, when applied to bury the corpse, refused, I cannot, in this stage of the proceedings, hold that this is an offence which cannot be committed a second time. The party has apparently not performed a duty incumbent on him. I think the offences may be separated from each other, and that the second refusal may be an offence for which he may be proceeded against; although the first offence may have been committed in February, 1840.

I overrule the protest, assign the party to appear absolutely, and reserve the costs until the final hearing, or other disposal of the cause.

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On the 11th of July, 1843, the Judge of the Consistory Court of London pronounced his final sentence, in a cause of separation, by reason of adultery, then depending before him, promoted by Lady Frankfort against Lord Frankfort, whereby he declared that Lady Frankfort was, by law, entitled to the separation she had prayed, and allotted certain sums to her in respect of alimony pending the suit, and for permanent alimony.

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appeals. The
libel of appeal
ought to agree
with the
inhibition.

From this sentence Lord Frankfort in due time appealed, and the usual inhibition and citation issued.

The *præsertim* of appeal, set forth in the inhi-

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bition, was as follows:—"and especially from the said Judge having, on or about the 11th day of July last past, read, signed, promulged, and given the sentence porrected by the Proctor for Lady Frankfort, whereby he did pronounce and declare, that she ought by law to be divorced and separated from bed, board, and mutual cohabitation with Lord Frankfort, her husband. And did allot the sum of 550*l.* alimony during the dependence of the suit, and the sum of 800*l.* per annum, as permanent alimony; and from every thing following or arising therefrom. And also from all other grievances, nullities, iniquities, injustices, and errors and proceedings, and other facts or acts which may or shall be collected from the pretended proceedings of the said Judge."

The libel of appeal was as follows:—

Second Article.—That the said Judge did unduly, on or about the 11th of July, 1843, by his decree, allot the sum of 550*l.* as or by way of alimony, during the dependance of the said suit, and also the sum of 800*l.* per annum, as or by way of permanent alimony, and did direct the same to be computed from the 11th of July in the said year, being the date of the sentence given by him in the aforesaid cause in the said Court, contrary to law and justice, and acting in all things nully and unjustly.

Third Article.—That the Proctor for Lord Frankfort had appealed.

Fifth Article prayed right and justice, and also that it might be pronounced and decreed, that the Judge, from whom this cause is appealed, hath proceeded wrongfully, nully, and unjustly, from

His having by his decree, &c. [The *præsertim* of appeal, as set forth in the second Article, here followed.]

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The admission of this libel of appeal was opposed by *The Queen's Advocate* and *Elphinstone*.

The libel of appeal differs from the inhibition; the latter impugns the *whole* sentence, the former only that portion of the entire sentence which allots alimony. The prayer is merely, that justice may be done as regards the allotment of alimony, the Court will only look to that part of the process which relates to the prayer made in the libel of appeal, but the whole process may be necessary, in order that the Court may arrive at a correct decision in this respect.

Jenner and Harding, contra.

There is no authority for the proposition, that a libel of appeal must coincide with the inhibition. According to the ancient practice, the libel of appeal preceded the inhibition; the Judge of appeal first perused the libel, and then issued an inhibition or not, as seemed meet. The civil law does not require the cause of appeal to be set forth. Part of an appeal may be waived at the hearing. *Greg v. Greg (a)*.

SIR HERBERT JENNER FUST.

This question relates to the admissibility of a libel of appeal. Certainly it is not a very usual proceeding to take an objection to the admission

(a) 2 Add. 276.

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of a libel of appeal, but, still, cases have occurred, in which objections have been taken, and, in some instances, they have been upheld. The Court will therefore consider, on general principles, and on general practice, whether the objection has been rightly taken, or ought at once to be overruled.

This is an appeal from the Consistory Court of London, in a cause of divorce by reason of adultery, promoted by Lady Frankfort against Lord Frankfort. The Judge of the Consistory Court pronounced sentence, holding the libel to be fully proved, and he signed a sentence of separation from bed and board, by reason of the adultery; at the same time he proceeded to allot 550*l.* per annum for alimony pending the suit, and 800*l.* per annum for permanent alimony. It is certainly a very inconvenient mode of proceeding to postpone allotting alimony *pendente lite*, until the final hearing of the cause; it seems however, that the cause was concluded, and that alimony *pendente lite* was not prayed in the former stages of the suit.

The Queen's Advocate.—The period between the commencement of the suit, and the final hearing, was very short.

From that sentence an appeal was alleged, and an inhibition taken out, which ties up the hands of the Court below, as to every part of the sentence; by the inhibition it would appear, that the appeal is from the whole sentence, [The Court read the *præsertim* of appeal in the inhibition.] In point of fact the whole sentence is appealed from; the allegation of appeal is from the whole sentence, and by

the citation, Lady Frankfort is cited to appear and answer to Lord Frankfort, in an appeal from one entire sentence. The inhibition was granted on this allegation of appeal.

To this inhibition and citation an appearance has been given on behalf of the party cited ; and a libel has been given in by the party appellant,

This libel of appeal sets forth a part only of the sentence, and that is, such part, whereby the Judge allotted certain sums for alimony, pending the suit, and for permanent alimony. The third Article alleges,—“ That the proctor of Lord Frankfort, looking upon, and believing his party to be injured and aggrieved by all and singular the nullities, iniquities, injustices,”—that is, by all the injustices and so forth, set forth in the second Article of the libel ; not a single syllable is here said as to this not being the entire sentence ;—this is not the usual mode of proceeding in an appeal.

The *præsertim* of the appeal is, “ Especially from the said Judge, having on the 11th day of July, 1843, by his decree, allotted the sum of 550*l.*, as or by way of alimony, during the dependence of the said suit, and also the further sum of 800*l.* per annum, as or by way of permanent alimony ; and from his having directed the same to be computed from the 11th day of July, in the said year. This, then, is what is alleged, in the libel of appeal, to be the ground of appeal ; it follows, that the libel and inhibition do not agree ; the inhibition is, as to the whole sentence ; the libel as to part only ; which am I to proceed upon ? why inhibit from the whole sentence, and then appeal only as to part ?

It has been said, there is no authority against

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such a mode of proceeding; there may be recorded authority, but it is every-day's practice proceed in a contrary manner; I never before saw a libel of appeal, which did not set forth the whole of a sentence,—the sentence must be set forth otherwise *non constat*, that there is any sentence and then the proper course is, to state, that the appeal is, “from so much of the said sentence as prays, &c.”

The Judge of the Appeal Court must be informed whether the appeal is from the whole, or only from a part of the sentence; but here I am left in the dark; the Court is to find its way between the assertion in the libel, and in the inhibition. The proper practice is, for the libel and inhibition agree; and if the inhibition is from the whole sentence, and it is afterwards thought prudent advisable to abandon a part: it should be so stated in the libel, or it may be done in acts of Court; but it should not be left to inference.

Under these circumstances I am of opinion, that this libel of appeal is not admissible in its present form; therefore, it must be reformed.

CONSISTORY COURT OF LONDON.

STONE *against* STONE.

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Addams moved, pursuant to notice, to expunge the depositions of a witness examined in this cause; he stated, that it was a suit of divorce, brought by a wife against her husband; the wife's libel had been given in, admitted, and witnesses examined; publication thereon was stopped by the assertion of an allegation on the part of the husband; this plea was admitted, witnesses examined, and publication prayed; whereupon the wife asserted an allegation; this third plea was admitted, and a term probatory assigned.

The term probatory, assigned on a third plea, opens the term probatory on the previous pleas in the cause. The extension of a term probatory, being in the discretion of the Court, granted on equitable conditions.

The proctor for the wife, pending this term probatory, examined a witness on the fourth Article of the libel. *Addams* submitted, that the granting a term probatory on the third plea did not open the term on the previous pleas.

Jenner (same side) mentioned a case of *Elwyn* v. *McQueen*, Prerog. 1838.

The Queen's Advocate, contra.

DR. LUSHINGTON.

This being a point of strict practice, perhaps it will be more satisfactory that I should refer to the Registrar.

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Mr. Registrar.—This is a suit brought by Mrs. Stone against Mr. Stone, there have been the following pleas—a libel; an allegation; and a second allegation, upon which latter plea a term probatory has been assigned; now, according to the practice, does this open the term probatory both on the libel and the first responsive allegation :

Mr. Shepherd.—I apprehend, Sir, that it does.

DR. LUSHINGTON.

In this case a motion has been made to this Court, calling on the Court, to expunge the evidence of a witness of the name of Fraser, who has been examined on the fourth Article of the libel, the initiatory plea in this cause; and he has been so examined under the following circumstances; after the libel and responsive allegation had been given in, another plea was offered on behalf of the wife; the Court directed that plea to be reformed, and the Court had hoped that it had given the necessary directions in sufficiently clear and intelligible terms; some doubt, however, occurred as to the precise meaning and extent of the reformation, and the matter stood over until the first session of this term, when it was brought under my consideration; I directed such reformation to be made, as I had hoped I had originally ordered. It was understood, at the time, that the term probatory was extended to this session. It appears, that two witnesses have been produced, as to whom it is not necessary to say anything; a third witness has been produced, not on the third plea in the cause, but on the first plea, the libel. I am now moved to expunge his evidence,

and the motion is rested on two grounds; first, that on an assignment of a term probatory on a third plea, there can properly be no examination of witnesses on the libel; secondly, that the fourth Article of the libel is of such a description, that no witnesses ought to be examined upon it.

This first argument, I confess, I heard with no small astonishment, that when the Court assigned a term probatory on this third plea, it did not open the term probatory to all the pleas; I have no hesitation in saying, that the contrary has been the invariable practice during the whole of the time, that I have been cognizant of the practice of this Court. Beyond doubt, it is competent to a Judge to say that he will admit a plea, upon condition, that the party shall only examine witnesses on that plea; that must have been the course in the case cited, and that is not the only instance in which a Judge of this Court has admitted a plea on terms, namely, that the party was to take the examination of witnesses on that plea, and on that plea only. There must have been some misapprehension in the note of that case, if it was supposed, that the learned Judge laid it down as the general practice in these Courts, that assigning a term probatory on a plea, did not open the term to all the previous pleas in the cause.

On that ground, therefore, I cannot reject or expunge this evidence.

On the second ground, I am of opinion, that the application is premature; I think this is an application which ought properly to be made when the cause comes on for hearing; if I then find that any witness has been examined on an Article of the libel, on which no witness ought to have been examined,

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1843. that will be the time, and not until then, to object
 Dec. 16th. to such evidence; there will then be an opportunity
 of considering the libel, and the evidence produced
 on it, and whether the evidence is admissible or not.
 I decline, therefore, to expunge this evidence; but
 I leave totally untouched, the question, whether any
 witness has been examined on any article, as to
 which he ought not to have been examined.

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The Queen's Advocate, moved to extend the term
 probatory on the third plea, on an affidavit that
 there were three material witnesses to be examined—

Addams and Jenner opposed.

DR. LUSHINGTON.

My opinion is, that if I do extend the term
 probatory, I shall assuredly accompany it with a
 condition that neither of these witnesses shall be
 examined on the libel. The course I shall adopt
 will be the following;—this is an application for an
 indulgence to extend a term probatory, and it is in
 the discretion of the Court to grant it, or not; or
 to extend it under such conditions as may seem
 meet for the purposes of justice. The application
 itself is founded on an affidavit of Mrs. Stone, and
 it states, “That Eliza Price is an important wit-
 ness; that Mrs. Stone had written to her in due
 time to be examined; that she received an answer
 from the party, requiring to be furnished with
 funds for the purpose; that the deponent immedi-
 ately transmitted money to the witness.” I think it
 is consistent with justice, that this witness should be
 examined upon this plea, but I conceive I ought

not to extend the term probatory further than as regards the third plea; at all events, not without more satisfactory evidence. An application to extend the term probatory, ought never to be made, for the purpose only of bringing in witnesses on the former pleas; and if, under such circumstances, the term probatory should be extended, it would lead to this highly inconvenient practice, that a third or fourth plea would be given in, containing matter of no importance whatever in the cause, or which never could be established in evidence, for the mere purpose of examining witnesses on the libel. This would be to open a door to consequences which the Court would be very sorry to see. Therefore, with respect to this witness, I will allow her to be examined, under the condition, that her examination is confined to the third plea. With regard to the witness Hawkes, the statement is very unsatisfactory; it is, merely, "That he is travelling in France," nobody knows where! and if any letters have been directed to him, it is not said where; and it is not even stated, that they may reach him. If the application was founded solely in regard to the witness Stevens, I should, most certainly, not extend the term probatory at all; it is merely said, "That he was resident in India, but is expected prior to the expiration of the term."

Upon the whole, I think, I shall best do justice, by extending the term probatory until the first Session of next Term, limited to the examination of these three witnesses only, if they shall come in in time, and limited to the allegation last given in.

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COLLETT against COLLETT.

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A citation issued from this Court, addressed to a party then residing and being within the diocese. The party quitted England before service was effected. The citation was personally served on him in parts abroad. Protest to appearing—overruled.

A proctor taking out a citation for a party, had not a formal proxy from his client at the time it issued. Protest to appearing—overruled.

On the 22nd of September, 1843, a citation issued from this Court, at the instance of a proctor, acting on behalf of Mrs. Collett, calling on Mr. Collett, who occupied a house within the diocese, in which he was inhabiting at the time, to appear and answer in a cause of separation by reason of adultery. Before service of this citation could be effected on Mr. Collett, he quitted this country. Service was made on him, personally, at Malines, in the Netherlands, by shewing the original citation, and leaving with him a true copy.

Mr. Collett appeared under protest, assigning two grounds of protest.

First, that the said service was illegal.

Second, that at the time of the citation issued, the proctor for Mrs. Collett had no formal proxy from his client.

Haggard and Bayford, in support of the protest.

Phillimore and Addams, contra.

[The arguments of counsel are fully stated in the Judgment.]

DR. LUSHINGTON.

It is necessary, in the first place, to state the facts of the case, before coming to a consideration of the legal question.

I consider this case to be of some importance ; for there is not, within my recollection, any judgment, at least, none in a suit brought by a wife against her husband, upon a question precisely similar to this.

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The citation in this case purports to be taken out at the instance of the wife against her husband, and the service of that citation is stated, by the party who served it, in the following words ; (the citation is dated the 22nd of the month of the present September,)—" I certify, that on Monday, the 5th day of September last, I proceeded to the house, &c., in the parish of St. George's Westminster, for the purpose of serving this citation on the within-named J. Collett, but I was informed by his agent, who was in the said house, that the said J. Collett was gone abroad. And I further certify, that having ascertained that such information was correct, I proceeded to Ostend, and on the 27th day of the said month, met with the said J. Collett at Malines, in the Netherlands ; and then and there produced this original citation, under seal, to him, and left with him a true copy hereof." The citation itself is in the ordinary form ; the person who served it made inquiries at the house, which he understood to be the residence of the party cited, and which is within the jurisdiction of this Court ; he did not leave a copy there ; but, following the party out of the jurisdiction, he serves him personally, by producing the original citation, and leaving a true copy.

Mr. Collett has appeared under protest to the citation so served, and the protest consists of two points ;—the first, that the citation was taken out

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before a proxy was executed by Mrs. Collett to her proctor; the other point is thus set out, in these words of the act on petition:—"That the jurisdiction of the Consistorial and Episcopal Court of London, for and in respect of the said citation, is limited to, and does not extend beyond, the said diocese of London; and that a service of such citation can only be lawfully effected, in virtue of the seal, under which the citation is issued, upon the party therein named to be cited, in and within the jurisdiction of the said Court."—Therefore, the ground of nullity in this citation is, that it was served abroad.

It appears to me to be indispensable to see what jurisdiction the Court had over the original cause. The evidence before the Court, as to the jurisdiction, consists of two affidavits, the one made by Mrs. Collett herself, stating that she resided with Mr. Collett, at, &c., in the diocese of London, up to the 14th day of June, 1836, when the deponent left the said house; and the said John Collett has continued to occupy and reside at the said house, up to the month of September, in the present year, when, on or about the 25th day of that month, the said John Collett left London for the Netherlands, leaving his servants in charge of the said house, and the deponent believes the said John Collett is shortly expected to return to the said house. It must be observed, there being no contradiction in this affidavit, that the facts appear to be thus;—the citation issued on the 22d of September; the party quits on the 25th; two days before the period of the attempted service. The other affidavit, is by Mr. Henderson, he states,—“that he is the co-

or of the poor-rates, for the parish of, &c., that John Collett has, for many years, been assessed the poor-rates, in respect of the said house, and continues to be so assessed."

Under these circumstances, presuming Mr. Collett have unpremeditatedly gone abroad, just at the of the proceedings, has this Court or not jurisdiction to proceed where the party is abroad? Now the Court may so proceed, is a point not conceded; but it is said, that the foundation of the question, which the Court has to determine, on which the Court has jurisdiction, depends on fiction. The Court always looks, on a question of jurisdiction to the statute of Henry 8th, (c. 9,) which was passed in affirmance of the Common Law, and by which this Court, among others, had local limits annexed to it. That statute is the document by which this Court must be governed in these proceedings; it was passed for the purpose of preventing abuses which took place, by reason of the necessity, to appear in the Arches, and other Ecclesiastical Courts, being served on a party *far from out of the dioceses*, where the party cited *dwelt*, (the words are of some importance) not *where they might happen to be at the period of issuing the citation*, but out of the diocese wherein he dwelt. No doubt the word *dwelt*, means a *permanent dwelling*: in no other part of the statute are there words to give a different meaning to the words we cited, and in the enactment, the words are, that no manner of person shall be cited, or called to appear out of the diocese, wherein he shall be *dwelling*, at the time of the awarding, or going out of the citation. Undoubtedly, the word *inhabiting*

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bit is here used in precisely the same sense as the word *dwelt*, in the prior part of the statute. The term *inhabit*, is one to which many meanings have been attached by the law, and is one which can only be construed by reference to the circumstances of each individual case. This was so decided in a case, where great discussion took place as to the meaning of this word, (it was before an election committee, for the county of Sussex) all the authorities, and all the different meanings of the word were there discussed ;—so it has been held in many subsequent cases.

Looking to this case, with a stricter eye, it is even more clear that Mr. Collett is within the jurisdiction, no doubt he was resident in the house, in, &c., and was actually in the house, at the time of the going forth of the citation, on the 22d day of September.

Such being the words of the statute, what is the construction put upon them in other Courts? there is a case to be found in a book which I now hold in my hand, (Burn's Ecclesiastical Law.) I have had reference to the original Reporter (a), and I find the case most accurately quoted; it is thus—“ 8 James, An attorney, in the King's Bench was sued in the Arches, for a legacy; and, for that he inhabited in the diocese of Peterborough prohibition was prayed and granted; because though he remained here in Term time, he was properly inhabiting, within the jurisdiction of the Bishop of Peterborough,” plainly thereby shewing that in the opinion of a Court of law, the true construction of the statute is, not the inhabiting, acc-

(a) 2 Brownlow, 12.

ally, and for a single purpose, within the jurisdiction; but means a general habitation, in the place in which the jurisdiction of the Ecclesiastical Court is founded. From the nature of the case, and a transitory action such as this, I look upon the case as an authority much in point. *Woodward v. Wakepeace* (a), is not so much in point, but yet, to a certain extent it illustrates the case. It was combined, that Woodward had been cited out of the diocese of Lichfield and Coventry, he having been cited in the diocese of Peterborough; but the Court King's Bench held, that this was not a citing out of the diocese, within the statute 32 Hen. 8th, c. 9, for he is an inhabitant where he occupies land, as well as where he personally resides.

In the present case, the party cited occupies a house within the diocese, and was actually resident there before and at the time of the citation. What was the course pursued by Lord Stowell in the case *Herbert v. Herbert*? According to that case, reported in 2 *Phillimore* (b), the evidence was the same, (perhaps not so strong as in the present case,) as to the habitation of Lord Herbert, from the time of the *quasi* commencement of the suit up to the serving the citation; Lord Stowell did not hesitate to pronounce Lord Herbert in contempt; there was not, in that case, any personal service, or service *viis et modis*, by leaving a copy of the citation at the house of the party cited. Let us consider a little further, what was done in even a more important and difficult case; in the case of *Inducci* (c), for that is an authority of the Court

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(a) 1 Salk. 164. (b) P. 430. (c) Cited *arguendo*, 3 Phill 595.

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of Arches. It was a suit brought after a party, a foreigner, had quitted the country, and by reason of a residence in the Haymarket, he was served by leaving a copy at that place, and pronounced in contempt; and that too in a suit for annulling a marriage, and not merely for a separation by reason of adultery. The Court of Arches stopped only just before the final determination, in order that the party might have personal notice given him in Naples; here then, in the Court of Arches, personal service was ordered to be made on an individual in the kingdom of Naples; I use this expression as an answer to the argument,—that the Court has no jurisdiction to issue process out of the diocese,—that here the Court of Arches issued such process, if process it be; but in fact it is a misnomer to call it so.

So stands the law on the construction of the statute. The decided cases, and the facts of this case, most clearly demonstrate that the Court had jurisdiction at the time of issuing the citation.

Now, on what has the whole argument in this case been founded? On this; that the citation has not been properly served; that is the sum total of the argument. I looked forward to hearing, what would have been proper service, according to Mr. Collett's counsel; I expected to have heard, that a copy ought to have been left at the house within the diocese, and then, whether notice had been personally served on Mr. Collett or not; that Mr. Collett might have pressed the Court, as in the case of *Herbert v. Herbert*, and without any of this preliminary argument, to have pronounced Mr. Collett in contempt; but I have not heard any such sug-

gestion. It may be the ordinary course to leave a copy of the citation at the house where the party was resident at the time it issued, *cui bono*, for what purpose is the copy left at the house? Evidently and clearly for one purpose, and one purpose only; that it is most probable that by this means the party will obtain a *personal* knowledge of the proceedings. The law is indulgent to the party proceeding, and allows her to go on by serving process at the house; and a serving the process on the individual, wherever he is found, in lieu of constructive service, is nothing more nor less than what the law allows. That is the real foundation of the whole objection in this case. In the case of *Warrender v. Warrender*, the House of Lords treated on this very point. How far then is that case an authority? Does that case apply to this? There is only one distinction between them, and that is this,—that was a case of a husband proceeding against a wife, and this is a case of a wife proceeding against a husband. In the case of *Warrender v. Warrender*, it stood thus: Sir G. Warrender, being resident in Scotland, took out process from the Court of Session in Scotland, (the Court on which all the jurisdiction in such matters had devolved,) calling on Lady Warrender to appear in a cause of separation or divorce, by reason of adultery; the proper mode of serving the wife would have been by edictal process; and this process would properly have been served on Lady Warrender at Sir G. Warrender's own residence, in Scotland; that would have been the strict ordinary mode of proceeding, the law presuming the domicile of Sir G. Warrender to be the domicile of the wife;—that service

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would have been made in Scotland. Instead of doing that, the husband caused the citation to be served, in France, on Lady Warrender personally. An objection to this service was taken in the Court below, which was the Court of Session—it was overruled there, and actually was brought up by appeal to the House of Lords in England. How did Lord Brougham deal with the objection?—with the approbation of the other law members of the House—he said, “Could there be an argument more nearly approaching to the *reductio ad absurdum*? the edictal process is admitted to be for the purpose of giving notice, and here, when in point of fact you do give notice of the proceedings in the cause, in a manner which evidently admits of no doubt, because it is personal service on the party, you come and tell me that it would be better to adopt other means of service whereby notice of the proceedings could not be known, namely, by serving it in Scotland, at a place five hundred miles off from where the party was actually resident.” So that argument was disposed of, and so, think I, it ought to be disposed of in this case.

Now, let us see whether the authority of that case is or is not applicable to this case; whether or not the circumstance that the present suit is brought by the wife against the husband, makes any difference? I think it does, but that it makes strongly the other way:—only look to the facts! in that case it was held to be good service, although the Court of Session of Scotland could have no more power to cause service to be made in France than this Court, or any other Court could. All Ecclesiastical Courts are, in this respect, in the same condition;

PREROGATIVE COURT OF CANTERBURY.

In the Goods of CHARLES G. COOKE, *deceased*.

Motion.

1843.

Jan. 16th.

CHARLES G. COOKE died on the 26th of December, 1842, a widower, leaving an only child, a married woman, him surviving. The deceased had made, and duly executed a will, on the 30th of July, 1840, and a codicil on the 22nd of December, 1842; on this last day he re-executed his will, in consequence of certain alterations having been made therein since July, 1840. By the codicil, the deceased had made provision for his grand-children, the children of his said daughter. The daughter and her husband were appointed executors of the will.

Special probate of will and codicil cancelled, (the former inadvertently,) the latter by the supposed assent of a testator, not competent at the time to give directions for such cancellation.

On the morning of the day on which the deceased died, his daughter being alone with him, she proposed to him to revoke the codicil, and, understanding and believing that he assented to the proposition, she took the codicil and will, and finding that the latter had been re-executed on the same day as the codicil, she cancelled both instruments, by tearing off the seals and the signatures.

It appeared, from the opinions of the medical attendants of the deceased, that at the time when the daughter supposed that the deceased assented to the cancellation of the codicil, he was in fact

1843. incapable of comprehending or giving any assent
Jan. 16th. to the proposition.

In the Goods of
COOKE,
deceased.

The Queen's Advocate moved, on behalf of the daughter and of her husband, for probate of the will and codicil.

SIR HERBERT JENNER FUST.

Both papers are, to all appearance, revoked, and would be effectually cancelled, if the act had been done by the deceased, or by his directions *anirrevocandi*. On looking to the affidavits, however, I am clearly of opinion, that the deceased was incapable, at the time when the act of cancellation took place, of giving any directions or assent, for revoking a will: the act of cancellation is, therefore, a nullity. The interest of the daughter and of her husband is opposed to the grant of probate of these papers, for the daughter is the sole next of kin. I decree probate of the will, as when re-executed, and of the codicil, with an affidavit explaining the circumstances of the cancellation.

The Registrar.—With the name of the deceased attached?

Per Curiam.—No; the affidavit will explain why it is omitted.

Addams mentioned, that in *Brooke v. Kent* (a) the Judicial Committee of the Privy Council restored a part of a will, struck out by the deceased.

(a) See *ante*, p. 512, and *Soar v. Dolman*, *ante*, p. 121.

Per Curiam.—That was in the body of the will ; 1843.
 —I do not consider myself at liberty to restore a Jan. 16th.
 signature. There must be a special probate shew- In the goods of
 ing the circumstances under which it is granted. COOKE,
 deceased.

In the goods of SUSANNAH BIOU, deceased.

The SCHOOL for the INDIGENT BLIND, and the
 WESTMINSTER HOSPITAL *against* FLACK and Others.

Motion.

1843.

Jan. 25th.

SUSANNAH BIOU died in the year 1821. By her will, she bequeathed to Mary Dickens, the interest of 1000*l.* consols for life, and at her decease she bequeathed the said principal stock to the Hospital for the maintenance of the Blind, situate in St. George's Fields. The deceased also bequeathed the interest of 1000*l.* like consols, to Elizabeth Keys for life, and at her decease gave the said principal stock to the Westminster Hospital. And she directed that Mary Dickens and Elizabeth Keys should enjoy their annuities free of legacy duty. The deceased appointed H. G. Flack, and C. W. Hollier her executors and residuary legatees ; both executors proved her will in this Court ; the former survived and is co-executor, and died in 1830, having by will appointed three persons to be his executors, all of whom proved his will in this Court, and are since deceased, the survivor of them having died intestate.

Administration with a will annexed granted to the joint nominees of two charitable institutions, to whom legacies, expectant on life interests, had been bequeathed but limited to a fund appropriated for payment of the legacies. The parties entitled to a general grant having been cited, and not appearing.

1843. H. G. Flack and C. W. Hollier had appropriated
 Jan. 25th. a sum of 1800*l.* 3 per cent. consols, standing in the
 In the goods of name of Susannah Biou, to answer in part the two
 Biou, annuities, and to satisfy the principal legacies on the
 deceased. determination thereof respectively; and had also
 purchased 200*l.* like consols in their own joint name
 for the purpose of satisfying the said two annuities in
 full, free from legacy duty.

The 1800*l.* continued to stand in the name of
 Susannah Biou; and the 200*l.* in the joint names
 of H. G. Flack and C. W. Hollier. The amount
 of the annual dividends had been regularly paid to the
 respective annuitants.

It being necessary to obtain representation to
 Susannah Biou; a decree with intimation issued
 from this Court on the 19th of December 1842, at
 the instance of the president, vice-president, treasurer,
 and members of the school for the Indigent
 Blind, and of the president, vice-president, treasurer,
 and governors of the Westminster Hospital, the two
 institutions to whom the bequests of 1000*l.* consols
 were given in remainder, the decree cited the four
 residuary legatees named in the will of H. G. Flack,
 and the husbands of two of such residuary legatees
 who were married women; and also the executor of
 C. W. Hollier, to appear and accept or refuse administration
 with the will annexed of the goods of
 Susannah Biou left unadministered, or otherwise to
 shew cause why the same, limited to the sum of
 1800*l.* consols, and the dividends to grow due
 thereon, for the purpose of carrying into effect the
 trusts contained in the said will, should not be
 jointly granted to C. Dodd, and C. J. Kempson as
 the respective nominees of the said two institutions.

This decree was personally served on the several parties and returned into Court. 1843.
January 25th.

On this day, on default of appearance by any of the parties cited, In the goods of Biou, deceased.

Addams moved, that letters of administration with the will of Susannah Biou, deceased, should be granted to the said C. Dodd and C. J. Kempson limited according to the tenor of the said decree.

SIR HERBERT JENNER FUST.

I think it is both desirable and proper that a grant should be made in the way proposed, otherwise the two annuitants will be unable to obtain the annual payments to which they are respectively entitled.

The Registrar.—According to the ordinary practice there should be a general grant.

Per Curiam.—It is not advisable to encumber these two hospitals with a general grant.

In the goods of SARAH DENSTON, deceased.

Motion.

1843.

February 3rd.

SARAH DENSTON, widow, died on the 18th of July, 1840, having, on the 6th of the June previous made a will, and appointed two executors thereof.

Will lost, motion to admit a verified copy to probate, rejected the next of kin not having been cited.

Shortly after the death of the testatrix this will

1843. was found in a chest of drawers in her house, by
February 3rd. Mary Harrison, her sister, who delivered it to her
husband, John Harrison ; it remained in his custody
until the latter end of 1841, when he delivered it
to Mr. Gronow, one of the executors.

In the goods of
DENSTON,
deceased.

Mr. Gronow, by affidavit, stated, that he had deposited the will in some place for safe custody, but has been unable, although he had made all diligent search, to find the same.

During the time this will was in the possession of John Harrison, his son, M. G. Harrison, made a copy thereof, and carefully examined the same with the original.

Shortly after the testatrix had executed her will, it was borrowed of her by a Mr. Cunningham, a trustee named in her husband's will, and he made a copy thereof in a book belonging to him.

The copy made by M. G. Harrison, and the copy made by Mr. Cunningham were compared, and found to correspond.

Upon affidavits of the above facts,

Deane moved the Court to decree probate of the copy of the said will, as made by M. G. Harrison, to be granted to the two executors named therein, limited until the original will, or a more authentic copy thereof, should be brought into the Registry.

1843.

The *Court* rejected the motion.

Dec. 13th.

The motion was now renewed, on the following additional evidence. Mr. Gronow further deposed, that in May, 1840, he received instructions from the testatrix to prepare her will, and, accordingly,

caused a draft copy to be made, which was perused and settled by him ; a fair copy of this draft was made and was duly executed.

1843.

Dec. 13th.

In the goods of
DENSTON,
deceased.

The following facts were stated, in order to account for the will not having been proved by the executors immediately upon the death of the testatrix.

William Denston, the husband of the testatrix, by his will gave and bequeathed a moiety of the clear residue of the monies to arise by a sale of his real estate to trustees, upon trust, to apply the interest thereof for the benefit of his child or children during minority, and to pay the principal to him, her, or them on attaining the respective age of twenty-one years, and, in the event of the death of every such child under that age, without leaving issue, then to pay the said moiety unto his wife, or to her executors or administrators absolutely. William Denston died on the 15th of February, 1840, leaving his wife and a daughter surviving.

Sarah Denston, the testatrix, died, as before mentioned, leaving her daughter surviving; the latter died on the 15th of May, 1842, a minor, and without having been married.

The moiety bequeathed by the will of William Denston, having, by the death of his daughter, devolved to the estate of Sarah Denston, it became requisite to prove her will, which otherwise would not have been necessary, she not having died possessed of any other property.

Mr. Gronow further deposed, that since the date of the former motion, he had made all further diligent search for the original will, but had been unable to find the same.

1843.

Dec. 13th.

In the goods of
DENSTON,
deceased.

Due execution of the will, and capacity of the deceased to make a will were fully established by affidavit.

Deane in support of the renewed motion.

SIR HERBERT JENNER FUST.

The difficulty which the Court feels, regarding this motion, is, that there is no party before the Court who has an interest in contesting the admission of the present authentic copy to probate.

There has been no decree citing the parties interested, in case of an intestacy. What do the next of kin say to the grant of probate? The affidavits are now very satisfactory, but the Court cannot decree probate behind the backs of the next of kin.

The next of kin may give in proxies of consent if they choose; but at present I must again reject this motion.

In the goods of SARAH BOSWELL, *deceased*.

1843.

Motion.

February 13th.

A married woman had power to dispose of certain stock and fur-

niture, by a will to be executed in the presence of two witnesses; and also to dispose of other effects by will generally. By a will, duly executed, she disposed of the stock and furniture; by an unsigned memorandum, at the foot of the will, in her own handwriting, (previous to the 1st of January, 1838,) she disposed of the other effects. Letters of administration with the will and memorandum granted.

SARAH BOSWELL, widow, died on the 9th of January, 1843, leaving a sister her only next of kin.

By a settlement, made previous to and in contemplation of the marriage of the deceased, a sum of Long Annuities, standing in the name of the deceased, and certain furniture, plate, and other effects; as also jewels, trinkets, and wearing apparel, were assigned to trustees, upon trust, as to the Long Annuities, furniture and effects, after the death of the survivor of the deceased and her intended husband, as the deceased by will, to be executed by her in the presence of two witnesses, should, notwithstanding coverture, appoint; and upon further trust, as to the jewels, trinkets, and wearing apparel, of which the deceased was then possessed, or might become possessed during coverture, to stand possessed thereof for the sole use of the deceased during coverture, and to permit her to sell the same, or to dispose thereof by will or otherwise, notwithstanding the coverture.

1843.
February 13th.
In the goods of
BOSWELL,
deceased.

The husband died on the 16th of August, 1837.

The deceased, on the 29th of August, 1836, by will duly executed, disposed of the Long Annuities and furniture. At the foot of the will, without date, or signature, was a memorandum in the handwriting of the deceased, bequeathing a watch, some articles of plate, and wearing apparel.

By a codicil, dated the 20th of February, 1837, signed by the deceased, but attested by one witness only, the Long Annuities bequeathed by the will, were otherwise disposed of.

White moved for special letters of administration with the will annexed, and with the memorandum or addition at the foot thereof, upon a proxy of con-

1843. sent from the sole next of kin. He admitted, that
February 13th. he could not ask for probate of the codicil.

In the goods of
BOSWELL,
deceased.

SIR HERBERT JENNER FUST.

The Long Annuities and furniture are properly and duly bequeathed. The deceased had a power to dispose by will generally, of certain jewels, trinkets, and wearing apparel; and, inasmuch as the additional memorandum to the will was made before 1838, I think it sufficiently complies with the general power; therefore, so far as the will, with the addition is concerned, I am of opinion, that there is a good execution of the powers.

The codicil cannot have operation, for the power to dispose of the Long Annuities was to be executed in the presence of two witnesses, and the codicil is executed in the presence of one witness only.

Administration of this will, with the addition, may be granted as prayed, it being understood that the next of kin has actually executed a proxy of consent.

In the goods of CATHERINE SINCLAIR, deceased.

1843.

March 14th.

Motion.

A will (dated 1841) revoking all former wills, referred to a clause in a former will.

Probate prayed of so much of the former will as was necessary to explain the latter will. Motion refused.

CATHERINE SINCLAIR died on the 18th of November, 1842; by her will, dated the 7th of June,

1841, she thus bequeathed: "Whereas my son and daughter have both died since the date of my *last* will and testament, now I do hereby give the share of my estate and effects, which would have gone to them if they had survived me, to the respective children of my son and daughter." It appeared by an affidavit, that the deceased, on executing the will of the 7th of June, delivered to a person, named as executor therein, a paper, which she said contained her former will, and directed him to destroy it. The will of the 7th of June revoked all former wills. The executor had not destroyed the former will, as pursuant to the directions of the deceased.

1843.

March 14th.

In the goods of
SINCLAIR,
deceased.

Jenner moved for probate of the will of the 7th of June, with such part of the former will as was necessary to shew the amount of the shares of the deceased's property which the son and daughter were to have taken under that will. He submitted, that as the grand-children were to take their respective parents' shares, it was necessary to include in the probate so much of the former will as shewed the amount of those shares; that the executor could not safely act without probate passing in such form.

SIR HERBERT JENNER FUST.

I do not see how the Court can decree probate of any part of the former will in conjunction with the present will, containing, as the latter does, an express clause of revocation of all former wills. I can only decree probate of the latter will as it stands. If the executor cannot safely act in the matter, he must apply to the Court of Chancery.

In the goods of GILES DAVIS, *deceased*.

1843.

Motion.

May 19th.

Will signed at the end of the first side of a sheet of paper, and attested on the second side, admitted to probate, on evidence of acknowledgment of the signature of the testator.

GILES DAVIS died on the 9th of April, 184—3, possessed of personal estate of the value of about 400*l*.

By his will, dated the 1st of April, 1840, he gave to his wife all his freehold property, for her life, and also all his household furniture, plate, books, stock in trade, and book debts, out of which she was to pay his debts, and whatsoever remained to be at her own disposal, to do with as she should think proper.

The will then disposed of the reversion of the freehold property.

This will was written on the first side of a sheet of paper, and was signed by the testator at the end.

On the second side of the same sheet was written, "I also appoint my wife, Jane Davis, executrix with my son, John Davis, and my son, Giles Davis."

This was subscribed by three witnesses, but was not signed by the testator.

By the joint affidavit of the attesting witnesses, it appeared, that on the 24th of March, 1843, the deceased being ill in bed, requested the first witness to bring him his will, and to read the same to him, having done which, the witness suggested the propriety of the will being attested; that the deceased concurred, and requested him to be one of the witnesses, and to send for the two other deponents for the same purpose. That previous to the arrival of the two last witnesses, the first witness, in the presence of the deceased, subscribed his name to

he will. That the two other witnesses having shortly afterwards entered the room, the deceased, addressing them, and looking at his will, which lay on a table by his bedside, with the first page thereof and his signature exposed to view, said, "I want you to sign my will," whereupon the first witness said, "as witnesses." That the two deponents then subscribed their names to the will in the presence of the testator, and of each other.

1843.
May 19th.
In the goods of
Davis,
deceased.

The signature to the will was proved to be in the handwriting of the testator.

Elphinstone moved for probate, omitting the clause on the second side of the paper, to be granted to the widow, as residuary legatee, and executrix according to the tenor.

SIR HERBERT JENNER FUST.

This joint affidavit is sufficient to entitle this paper to probate; there is no doubt as to the signature, "Giles Davis" being in the handwriting of the deceased, and that being so, the decisions of the Court have established the sufficiency of the acknowledgment of the signature. The clause appointing executors must be omitted in the probate; and there must be the consent of the parties interested. The form must be this:—Administration with the will annexed must be decreed to the widow, as relict, not as residuary legatee, I do not think she is residuary legatee, nor executrix according to the tenor.

At the conclusion of this case, the learned Judge said:—

1843.

May 19th.

In the goods of
DAVIS,
deceased.

I wish it to be understood as the general rule of this Court, that in every case where the consent of parties is required, proxies of consent must be actually in the registry before the Court is moved to make any decree in such case.

In the goods of JOHN BULLOCK, deceased.

1843.

June 8th.

Motion.

A will, written on the lower half of the second side of a sheet of paper, was presented (the sheet being folded broadways) to the witnesses, and was signed and subscribed on the lower half of the first side (the witnesses believing the will to be contained on the upper half of the first side). Probate granted with the consent of the next of kin.

JOHN BULLOCK died a widower, possessed of personal estate of about 600*l.*, leaving four children, namely, John Bullock, Emily Symes, wife of James Symes, Richard Bullock, and James Bullock, him surviving. The deceased left a will, which was made and executed in manner following: it was written on the lower half of the second side of a sheet of foolscap paper, the upper half of the third side had been torn off, and the lower half of that side when folded down concealed the writing on the lower half of the second side of the paper. The will was as follows: "This is the last will and testament of me, John Bullock, of No. 9, St. James's Square, in the city of Westminster, made this 13th day of June, 1842, I give and bequeath unto James Symes all my property and effects whatever and wheresoever to and for his own absolute use and benefit, and I do hereby nominate and appoint to be the executor of this my last will and testament, John Bullock, John Bullock, James Symes, Rollisson's Cottages, Tooting, Surrey." On the lower half of the first side of the sheet—"witness my hand this present

13th day of June, 1842. John Bullock. In the presence of the testator, by his desire, and in the presence of each other. Witnesses, Hudson Gurney, No. 9, St. James's Square, Thomas Young, 209, Piccadilly." Mr. Gurney, by affidavit, deposed :— that the deceased was his porter ; that on the 12th of June, 1842, he suggested to the deceased, who was then very ill, the propriety of settling his affairs, to which he assented, and expressed a desire to make his will, which he said would be a very short one. That the deceased was always of a very close and reserved disposition, and deponent, believing that he would be averse to calling upon any one of his fellow servants to witness his will, and would wish to conceal what his property was, and what was the disposition made of it, told him, that he, deponent, and Mr. Young, the surgeon, who was attending him, would be the witnesses, if he wished it. That deponent took up a sheet of foolscap paper and folded it down the middle (broadways) and told the deceased, he might write his will on the upper part of the side so folded, so that the witnesses subscribing their names to the lower part of the fold would not see the contents. That he left such sheet of paper with the deceased. That on the following day, Mr. Young having called to see the deceased, the latter, in the presence of Mr. Gurney, expressed a wish to execute his will, which he said he had made, and then produced the same sheet of paper, which Mr. Gurney had given him on the previous day, folded down ; that deponent, supposing the will had been written on the upper part of the fold wrote, on the lower part of the first side the words " witness my hand this present 13th day of June,

1843.

June 8th.

In the goods of
BULLOCK,
deceased.

1843. 1842." That the deceased signed his name in the
 June 8th. joint presence of deponent and Mr. Young, who
 In the goods of both subscribed it in the presence of the deceased.
 BULLOCK, That deponent does not remember to have seen
 deceased. the outer side of the paper at the time of execution,
 and did not notice any part of the same to have
 been cut off.

Jenner moved, for probate of this paper to be
 granted to John Bullock, the son of the deceased, as
 executor, upon consent of the three other children
 and of James Symes.

SIR HERBERT JENNER FUST.

Perhaps, strictly and literally looking at the lan-
 guage of the Wills Act, this paper is not signed at
 the foot or end thereof; however, upon the consent
 of all parties interested, I think I am able to decree
 probate of it.

It is very unfortunate that more pains are not
 taken to comply duly with the provisions of this
 act.

In the goods of CHARLES VENTRIS FIELD,
 deceased.

1843.

June 19th.

Motion.

A will, pre-
 pared for a
 party, who
 from paralysis
 had lost the
 use of speech,
 and almost of limbs, signed with a mark and duly attested, pronounced for.

CHARLES VENTRIS FIELD died on the 17th of
 May, 1843, leaving a widow, and one child him

surviving. He also left an illegitimate child. Both these children were minors. For some time previous to his death the deceased had been labouring under the effects of paralysis, which had deprived him of speech, and almost of the use of his limbs.

1843.

June 19th.

In the goods of
FIELD,
deceased.

On the 13th of May, three days before his decease, it being ascertained that the deceased wished to make a will, and also the way in which he wished to dispose of his property, his brother Francis Ventris Field, a solicitor, wrote a will for him.

The circumstances attending the execution of the will were thus stated in the affidavit of one of the attesting witnesses.

Henry Sawford, of Finchley, in the county of Middlesex, carpenter, deposed, that on the 13th day of May, he went into the bed-room of the deceased. That there were then in the room, the wife, the mother, three brothers, and two sisters of the deceased, as also Mary Chambers, his nurse. That Robert Field, one of the brothers, then produced the will in question to the deceased, saying, he had brought the paper for him to sign. That the deceased appeared to understand the nature of it, and put out his hand to take it. That the deceased was unable to sign his name to the will, or to make any declaration in respect thereof. That a pen was put into the hand of the deceased, and he made a cross or mark at the bottom of the first and second pages, and twice on the third page. That deponent and Mary Chambers, who were both present during the whole time, then, in the presence of the deceased and of each other, subscribed their names as witnesses to the execution of the will.

1843. By this will the deceased made provision for his widow and children, and appointed his widow and his brother Francis V. Field, executors.

June 19th. In the goods of FIELD, deceased.

Jenner moved for probate.

Per Curiam.—The evidence as to the deceased's capability of understanding the will is very slight; but the brother appears to have done all in his power towards the benefit of the illegitimate child. I think, under the circumstances, probate may pass. — Motion granted.

In the Goods of WILLIAM MARTIN, deceased.

1843.

Motion.

July 6th.

Will prepared and executed on a printed form; motion for probate rejected. Testator misled by printed directions.

WILLIAM MARTIN died in May, 1843. Being desirous of making his will, the deceased requested W. Ponsonby (one of his executors) to prepare the same for him; which W. Ponsonby did, by writing the same on a printed form, and he afterwards read the same over to the deceased, who approved thereof. On the 3rd of May, 1843, W. Ponsonby again read this will over to the deceased, in the presence of R. Mann and J. Martin; and the deceased again expressed his approbation of it, and desired and proposed to execute it.

The will was signed and attested as follows:—

The sheet of paper on which the printed form was contained, was divided into two columns or

divisions by ruled lines, and the left-hand column subdivided by another line. The first left-hand column contained printed directions for signing and attesting. The second of such two columns was thus headed, "Margin for signature of testator and subscription of witnesses in case of any alteration in the will." The right-hand column contained the body or dispositive part of the will; the will was written on the first and second sides of the sheet, the second side concluding with the appointment of executors, which occupied ten consecutive lines; underneath this was an attestation clause.

1843.

July 6th.

In the goods of
MARTIN,
deceased.

The testator signed the first side of the sheet within the second left-hand column, and the attesting witnesses, R. Mann and J. Martin, subscribed underneath; the deceased and the witnesses also signed the second side in like manner, his signature being opposite to the fifth line of the appointment of executors, the name of the first witness opposite the seventh, and of the second opposite the ninth line. The witnesses also subscribed at the end of the attestation clause.

Addams moved for probate. Compliance with the regulations of the printed form is sufficient; the mode in which the paper has been divided, makes the portion appropriated for the signature of the testator and for the subscription of the witnesses, to be in fact the end of the will. The dispositive part at least is duly signed and attested.

SIR HERBERT JENNER FUST.

I am afraid of putting a construction upon the act, as regards the question involved by this will,

left in blank ; on the third side was a full attestation clause, and, at the foot or end thereof, were the signature of the testator and the subscriptions of two witnesses.

1843.

Nov. 27th

In the goods
Gore,
deceased.

The will had been duly executed as regarded the act of signing and attesting.

White moved for probate, he cited, *In the goods of Carver, deceased* (a).

JUDGMENT.

SIR HERBERT JENNER FUST.

There is a material distinction between that case and the present in one respect ; here the will is signed and attested on the third side of the sheet of paper, the whole body of the will is contained on the first, the second side being left entirely in blank ; however, upon the circumstances I think the act of Parliament has been sufficiently complied with. By this will the *whole* of the deceased's property is disposed of, it is given to the wife, and she is named sole executrix ; and, consequently, there is no reason to apprehend that the deceased intended to make any further bequest. If the whole of the property had not been disposed of, the Court might have thought that the will was provisionally executed, and that the deceased intended to reserve to himself the power of giving other legacies from time to time. This paper is very fairly written ; there is a single alteration or erasure in it : at the conclusion of the first side are these words, "I have unto set my hand and seal"—here that side ends.

(a) *Ante*, p. 29.

1843. The will is not signed on this side, nor on the second
Nov. 27th. side, that is left in blank ; on the third side is the
In the goods of attestation clause, the signatures of the testator and
Goss, of two witnesses. It cannot be said to be signed at
deceased. the foot, but it may be said to be signed at the end.

Under these circumstances probate of this paper
may pass.

PREROGATIVE COURT OF CANTERBURY.

TOWNLEY v. WATSON.

1844.

January 25th.

SARAH TOWNLEY, spinster, died on the 20th of October, 1843. The deceased was possessed of 1500*l.* Bank stock, being the only property which she was enabled to dispose of by will. On the 10th of March, 1837, she duly executed a will in the presence of her solicitor, who had prepared the same for her. By this will, she gave several legacies; and among them, legacies to Dr. Watson, and to his children; and she appointed her brother, Mr. Townley, sole executor and residuary legatee. Upon her death, this will was found sealed up in an envelope, but the lines or passages containing the legacies to Dr. Watson and to his children were so completely obliterated with a pen and ink, as to be illegible.

A testatrix, obliterated, *animo revocandi*, several passages of her will, so that none of the parts obliterated could be distinguished upon the face of the will. Held, that this was a complete revocation within the meaning of the 1 Vict. c. 26, s. 21.

These obliterations not being attested according to the forms prescribed by the 9th section of the Wills Act, a question arose whether this was a good revocation of the legacies within the intent and meaning of the 21st section of the same act; Mr. Townley, the executor, accordingly propounded the will without the obliterated passages. His allegation, after stating to the above effect, pleaded, "That at the time when the deceased executed her will, her Bank stock, at the then market price, would not only have paid all the legacies, but have left

1844.
January 25th.

TOWNLEY
against
WATSON.

a residue. That some time in the year 1842, the deceased having a mind absolutely to revoke certain of the legacies contained in her will, obliterated the same altogether with ink, so as totally to efface the same; and so that the same cannot be made out on inspection of the will. That immediately after obliterating and effacing the same, she shewed the will to a female servant, and asked her whether she could make out what had been written there, at the same time holding the will up to the light, to enable her to judge the better; that the said servant told her, she could not make it out; whereupon the deceased boasted how effectually she had effaced the words. That the said servant having remarked, that some question might arise as to the obliterations; the deceased said, "So that I have done it, that you cannot make it out, that is sufficient." That the deceased, at the same time stated, as the reason for making such obliterations, that it was "In order that there might be some residue for her brother, which otherwise, owing to the depreciation of Bank stock, there would not be."

On behalf of the legatees, a counter allegation was offered, in substance, pleading, "That the deceased gave instructions to her solicitor to prepare her will, and that, pursuant to such instructions, a draft will was prepared, and the will propounded, copied or engrossed from such draft; that the two instruments were compared together, and found to agree in all respects. That the said solicitor took the will to the deceased, who approved of it, and duly executed it. That at such time there were no obliterations whatever on the face of the will. That the draft will was now in existence and pro-

duced, and, by reference to it, the obliterated passages could be faithfully and fully restored."

1844.

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The two allegations came on for argument.

TOWNLEY
against
WATSON.

Addams moved the admission of the first allegation.

H. I. Nicholl, on behalf of the legatees, was proceeding to oppose the admission of this allegation, by reference to the facts contained in the second allegation, when he was stopped,

Per Curiam.—The second allegation is not yet before the Court; the Court cannot travel out of the allegation now in debate.

H. I. Nicholl referred to *Brooke v. Kent*, (a) as a case closely resembling this in which the Judicial Committee had ordered the argument on the admission of an allegation propounding a will without the obliterated words, to stand over, until a counter allegation, propounding it with those words, had been given in, in order that the two allegations might be debated together as one single plea.

Addams, (one of the counsel in *Brooke v. Kent*,) said, that what has been stated as to the course pursued by the Judicial Committee was quite correct.

Per Curiam.—That may be the rule of the Judicial Committee, but it is not the rule of this Court.

(a) 3 Moo. P. C. C. 334.

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against
WATSON.

H. I. Nicholl, then admitted, that unless he was at liberty to assume the facts stated in the counter allegation, and to argue from them, as being probable circumstances, he could not oppose the admission of the first allegation; by reason, there was at present no *constat* that any evidence of the obliterated passages could be produced.

SIR HERBERT JENNER FUST.

I am of opinion that this allegation must be admitted.

The 21st section of the present Wills Act, provides "That no obliteration, interlineation, or other alteration made in any will, after the execution thereof, shall be valid or have any effect, *except so far as the words or effect of the will, before such alteration shall not be apparent*, unless it be re-executed as prescribed by the act," and the construction which the Court has, in a former case, put upon that word, "*apparent*," is, *apparent on the face of the instrument itself*.

In the case of *Brooke v. Kent*, evidence *dehors* the will was admitted; but that was a question of *intention*, and was so treated by the Judicial Committee. There was no intention entirely to revoke a legacy, the wish was to substitute a sum of 100*l.* for 200*l.* In this case, there is no intention to substitute one legacy for another; the intention is to revoke the legacies *in toto*. The Court being of opinion, that the proper construction of the 21st section is that to which I have just referred, considers this allegation admissible; and that if the facts pleaded be proved, this instrument will be entitled to probate without the obliterated parts.

The second allegation now came on to be debated. 1844.

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Addams. This allegation is inadmissible; assuming that the words obliterated can be correctly hewn by extrinsic evidence, this is not a mere iteration, it is not a simple obliteration in a will, it is a revocation by destruction of a considerable portion of an instrument. This case comes under the 20th section, which enacts "That no will or codicil, *or any part thereof*, shall be revoked, otherwise as hereinbefore mentioned; *or by the burning, tearing, or otherwise destroying* the same, with the intention to revoke." This is a complete *destruction of a part thereof* with an intention to revoke; it matters not how the act of destruction takes place, if the words are not legible it is as complete as if the deceased had torn off, or cut out this portion of the will, and burnt it.

H. I. Nicholl. This case comes under the 21st section; each legacy is a separate gift, and the fact that several separate gifts have been obliterated, cannot be taken advantage of so as to bring the case within the 20th section; that is, by arguing that the several obliterations together form so large a portion of the entire will that they constitute a part or parts thereof, within that section. The Legislature must be taken to have used the word *apparent* with reference to the tribunals which decide on what constitutes a will. What is the variable mode in which matters cognizable by Courts of law are made apparent to those Courts? by proper legal evidence. A contrary construction would make revocation by obliteration depend on

1844. the acuteness of vision in a Judge ; the Judge of a
 January 25th. Court is the proper person to decide a question of
 TOWNLEY obscure handwriting, *Remon v. Hayward.* (a)
 against
 WATSON.

Per Curiam.—That is not the rule in this Court; this Court looks to the evidence of engravers and persons skilled in the art of decyphering, and decides upon their testimony according to the best of its judgment.

[*Argument.*] That could scarcely be the intention of the Legislature ; such evidence, from its very nature, will almost always be conflicting ; in intricate cases it must ever be doubtful ; supposing, in this very case, an engraver can be found who will read these several legacies as “two hundred,” instead of “one hundred pounds” each, will the Court with this facsimile copy of the will before it, order the words “two hundred” to be inserted in the probate ?

Per Curiam.—If it be the only evidence that may be the effect of the construction which I have already put on this section of the act, and which has not yet been overruled. But you have not pleaded, that the words can be made out by the evidence of engravers, so that the Court will not be embarrassed with the difficulty suggested.

[*Argument.*]—Such a construction renders that part of the section, which provides, that all alterations and obliterations shall be attended with the

ceremonies prescribed in the 9th section, a mere nullity; no person will care to comply with those ceremonies, if simply tearing off or cutting out three lines in a will, can produce the same effect: it is contrary to the whole policy of the statute.

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"against
WATSON.

SIR H. JENNER FUST.

The question in this case now turns on the admissibility of an allegation, offered in opposition to an allegation already admitted, and which has propounded a paper bearing date in the year 1837, having on the face of it certain alterations or obliterations. Circumstances were pleaded, in that allegation, which could leave no doubt in the mind of the Court, that it was the intention of the deceased to revoke several of the legacies, which she had, at one time, given as part of that instrument. Looking to what the deceased had done the Court was of opinion, that according to the construction which it deems the proper construction of the 21st section of the Wills Act, it was bound to give effect to those obliterations as revocations of part of the will, inasmuch as the words effaced are not apparent on the will itself. That decision is in accordance with a former expressed opinion of the Court, to which it still adheres, and to which it will continue to adhere until better advised. The allegation of Dr. Watson pleads, what the words of this will, in its original or unaltered state, were; but it does not plead, that these words are apparent on the face of the instrument itself, or that they can be made out by the aid of magnifying glasses, or by evidence of that nature; it simply pleads the fact, that the words obliterated were such and such, and, in supply of proof,

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WASSON.

adduces the draft from which this will was engrossed or copied, and tenders the evidence of the professional gentleman who prepared both draft and will, and who, I assume, can also prove, that the words, appearing in certain lines of this draft copy, are the very same words as were inserted in and existing, on that portion of the will now effaced, at the time when it was executed by the deceased; and to be sure, no evidence could be stronger or more satisfactory to the Court in order to show what really were the contents of this will before it was thus mutilated. The question, therefore, comes to this, is any, and what, evidence admissible to prove what the words obliterated in this will were at the time when it was executed? The answer to this depends on the construction to be put on the 21st section of the act of Parliament. What, then, is the interpretation to be put on this section, when either words in a will, or the effect of words, are so completely effaced or obliterated as not to be apparent? Now, I think the *prima facie* construction must be *apparent on the face of the instrument itself*, and not that suggested in argument, namely, capable of *being made apparent* by extrinsic evidence. What is an obliteration? Is it not by some means covering over words originally written, so as to render them no longer legible? I cannot understand, if the Legislature really intended that extrinsic evidence should be admitted, why a few more words were not added, which would have freed the section from all doubt; for instance, why was it not thus penned, "unless the words shall be *capable of being made apparent*."

There may be inconsistencies and there may be inconveniencies—I do not say there are—in the

construction I am putting on the section ; but I think it is impossible to read the words, and not say, it was the intention of the Legislature, that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose, that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the act of Parliament. -

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Moreover, this is not a case, where, by restoring the words obliterated, the Court would be carrying out the intentions of the deceased ; there can be no doubt that it was her intention to effect a complete revocation of these legacies. I confess I do not feel the force of the argument,—as to the inconvenience to follow from such a construction ; because the Court will not, in the first instance, take upon itself to decide, whether the words obliterated can or cannot be made out ; if it be asserted in an allegation that they are capable of being distinguished on the face of the will, the Court will refer such an allegation to proof, and then pronounce its judgment according to the testimony which may be offered at the hearing.

The construction which has been put upon the 21st section by the Judicial Committee is this :— That, as in the prior section, the 20th, where a will is to be revoked by burning, tearing, or otherwise destroying the same, the act must be done with an *intention* to revoke ; so, in the 21st section, the Legislature must be assumed to have meant, that an obliteration, interlineation, or other alteration, shall be made *animo revocandi*, with an intention to revoke, not to substitute.

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Brooke v. Kent turned entirely on the want of intention to revoke, and that intention may be made out precisely as in other cases. I really do not think I should be justified in departing from what I have over and over again repeated is my construction of this act of Parliament. I do not enter into the question of the construction of the 20th section, or how far it refers to the destruction of the whole or of part of a will. I put the construction, I have already stated, on the 21st section, upon the ground, that these words not being apparent on the face of the instrument, are not to be supplied by extrinsic evidence. I think, however, this a very fair case upon which to take the opinion of the superior Court. I admit the allegation of the executor, and reject that of Dr. Watson.

Feb. 22nd.—On this day, upon proof of the fact pleaded in the allegation of the executor, the Court pronounced for the will without the obliterated passages. Costs out of the estate.

1844.

February 26th.

JAMES v. COHEN.

A testator, in the year 1832, made a will and codicil,

This was a cause of proving in solemn form law the last will and testament, with two codicils and, in March, 1836, a second codicil. In October, 1836, he executed a new will, prepared by his solicitor, and which was delivered into his own possession. At his death the will of 1836 could not be found. Held, that the effect of the execution of the later will was to revoke the prior will and codicils, and that the subsequent destruction of the second will by the testator presumed from it having been delivered into his possession and not being forthcoming) did not operate to revive the first will and codicils.

thereto of Lyon Cohen, a person of the Jewish persuasion, deceased, promoted by Thomas Hart James, one of the executors named in the second codicil, against David Cohen, the lawful brother, and one of the next of kin of the deceased.

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JAMES
against
COHEN.

The *first Article* of the allegation, propounding the will and codicils, in substance pleaded, that the testator, with his own hand, drew up a will, and, on the 21st day of June, 1832, signed his name twice thereto, first in English, and secondly in Hebrew characters. That, on the same day, he in like manner drew up and signed a codicil to his said will.

Second Article, that on the 19th of December, 1833, the testator entered into conversation with a Mr. John Saunders, on the subject of his said will and codicil, and showed the same to him in the presence of the said Thomas Hart James. That Mr. Saunders, having looked over the same, informed the testator that they ought to be witnessed, whereupon the testator acknowledged the several signatures to the will and codicil in the presence of Mr. Saunders, and of Thomas Hart James, and he directed Thomas Hart James to write a memorandum of such fact upon the will. That Mr. Saunders then wrote at the top of the sheet of paper, containing the will and codicil, the following memorandum:—"This document acknowledged in my presence Dec. 19th, 1833," and then, in the presence of the testator, subscribed his name thereto, which, being done, the testator, in the presence of Mr. Saunders, delivered the will and codicil to Thomas Hart James, and directed him to take care of them.

Third Article, that, on the 18th of March, 1836,

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the testator, intending to make certain additions to his will and codicil, had the same brought to him by Thomas Hart James, and he then conversed with the said Mr. Saunders on the subject thereof, and in the presence of Mr. Saunders, with his own hand drew up the second codicil, and signed it in Hebrew characters. That Mr. Saunders, in the testator's presence, attested the same by writing the following words:—"Witness, I. Saunders." That the testator then gave the will and two codicils to Thomas Hart James, and desired him to take care of them.

Fifth Article, that subsequently to the times when the testator wrote the will and codicils, and down to the time of his death, he mentioned and spoke of his will and codicils as being in the custody of Thomas Hart James.

Sixth Article, that Thomas Hart James is the grandson of the late wife of the testator, and was brought up and advanced by him in business. That the testator, up to his death, entertained and expressed a great regard for Thomas Hart James, and for his sister Mary Anne Cohen James, now the wife of Mr. C. Atterton. The will and codicil were as follows (Will):—

"London, June 21st, 1832. This is my last will and testament. I bequeath to Thomas Hart James all my stock in trade, lease of my house I live in, all fixtures therein, all my furniture, plate, linen of all descriptions, wearing apparel of every sort and everything whatsoever that is within my house and all debts on my books due to me, and all acceptances in my possession, and my imperial bonds free from all demands. Lyon Cohen." [Second signature in Hebrew characters.]

Codicil No. 1 (on the same sheet of paper.)

"All my other property to be equally divided between my brother, sister, Thomas Hart James, and Mary Ann Cohen James, and all demands on me to be paid therefrom. Lyon Cohen." [Second signature in Hebrew.]

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(Indorsement.)

"This document acknowledged in my presence, Dec. 19th, 1833. I. Saunders."

Codicil No. 2 "I appoint my worthy friend Mr. Benjamin Ball, and my grandson, Thomas Hart James, executors and administrators, March 18th, 1836. Lyon Cohen. [Second signature in Hebrew.] Witness I. Saunders."

David Cohen, the brother of the testator, gave in an allegation in answer, pleading in substance as follows:—

First Article, that in the month of October, 1836, the testator gave instructions to his solicitor, Mr. Morris, for the preparation of a draft will. That a draft will having been prepared, pursuant to such instructions, the testator approved thereof, and the same having been engrossed was duly executed in the same month by the testator. That he thereby expressly revoked all former wills and codicils by him theretofore made and executed.

Second Article, that the said last mentioned will was left with the testator, and he repeatedly afterwards adverted to the facts both of his having made such will, and of the same being in his own possession.

Third Article, that from and after the making and execution of the will, the testator made several attempts to procure from Thomas Hart James the return of his former will and codicils, but which

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were ineffectual, inasmuch as Thomas Hart James evaded doing so, and on one occasion, when the testator formally desired him to return the will and codicils, Thomas Hart James, in the presence of two persons, stated, that they were lost or mislaid, so that it was out of his power to return them.

Fourth Article, that the testator for some years before his death had become much less attached to Thomas Hart James than he had previously been, and evinced towards him, and expressed himself of him in terms of coldness and disregard, partly from Thomas Hart James having set up in the testator's own line of business in his immediate neighbourhood, of which conduct the testator highly disapproved. That Mrs. Atterton having in the year 1837 intermarried with her present husband, not only without the consent, but in defiance of the marked dissent and disapprobation of the testator, he became and was so incensed thereat that he wholly withdrew his former regard for her, and neither saw nor had any communication with her at any time after such her marriage.

Fifth Article, that Rebeckah Levy, widow, sister of the deceased, one of the residuary legatees named in the will, died in the month of June, 1839, and the fact of her death was well known to the deceased.

Thomas Hart James, by his personal answer admitted, that he had been informed by James Morris, solicitor, and believed, that the testator died in the month of October, 1836, give instructions and directions to the said James Morris for the preparation of a will, and that the testator in the said month executed a will prepared by James

Morris, or in his office, but, whether the testator did or did not thereby expressly revoke all former wills and codicils by him previously made, the respondent was unable to answer.

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That he hath been informed by the said James Morris, and believes, that the said will after its execution was taken possession of by the testator, but he disbelieves, and therefore denies, that the testator repeatedly afterwards adverted to the fact of having made such will, or of the same being in his own possession.

Witnesses were examined on the above pleas, but no witness was produced to prove the fact of execution of the will of October, 1836.

This cause having, on this day, come on for informations and sentence, the counsel for David Cohen read the personal answers of Thomas Hart James to prove the due execution of the will of October, 1836; whereupon it was contended, by the counsel for Mr. James, that, inasmuch as those answers only admitted the factum of that will on the information of Mr. Morris, Mr. Cohen was bound to produce and examine Mr. Morris.

July 10, 1843.

The Court, after adverting to the fact that the personal answers of Thomas Hart James would not bind other legatees interested under the former will and codicils, rescinded the conclusion of the cause, for the purpose of producing and examining Mr. Morris as to the due execution of the will of 1836.

On motion this day, the Court was of opinion, that Mr. Morris should be produced by Mr. Cohen,

Nov. 7, 1843.

1844. and Mr. James be at liberty to exhibit interrogato—
February 26th. ries for his cross-examination.

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Mr. Morris in substance deposed, that in October 1836, he prepared a will for the deceased; that it was duly executed by the deceased in the presence of deponent, and of one of his clerks, and was duly attested by them in the presence of the testator.

The draft of this will was produced; the following is its effect:—"To his brother David Cohen all his Hebrew books; his own picture to Deborah Alexander, wife of the Rev. Alexander; his stock in trade (but not debts owing thereon), furniture, plate, linen, china, and articles, and things belonging to his dwelling-house to his nephew Thomas Hart James; his leasehold house in East Smithfield to Thomas Hart James; to his executors, except Thomas Hart James, 50*l.* each; the residue of his estate upon trust to Benjamin Ball, Esquire, Thomas Hart James, and the Rev. M. Alexander, to convert the whole into money, and after deducting all expenses to pay one fourth part of the clear residue to the said Thomas Hart James. The other three-fourths upon trust to lay out and invest upon security, and to pay the interest of one-third of such securities to his brother David Cohen for life, and after his death to be transferred to the deceased's nieces, Deborah Alexander and Evelina Levy spinster. The interest of one other third part to be paid to his sister Rebecca Levy, widow, for life and after her death to be transferred to said Deborah Alexander and Evelina Levy. The interest of the remaining third part to be paid unto his niece Mary Ann Atterton (wife of C. Atterton) for her own use,

dependent of her husband, and upon her decease the said third part to be equally divided between her children, but in case of her decease without issue, or there being issue who shall die under 21, without leaving issue, then the same is to be divided equally between the said Deborah Alexander and Evelina Levy.

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It was proved that all due and diligent search had been made for the original will so prepared and executed in October, 1836, but without success.

Mr. Morris further produced a memorandum in the handwriting of the deceased, dated March, 1836, which had been left in his, the witness's possession; it was to the following effect:—"Having been informed by Mr. Saunders that I have signed some paper or papers giving some portion of my property to Thomas Hart James and his sister, beyond what I have given them by my will, I declare that they shall have no portion of the residue bequeathed to them until they have brought that into account; and when that, whatever it may be, is brought into account, they are to share in the residue."

The cause came on for hearing on the further evidence.

Hagyard and *Harding*, on behalf of Mr. James, argued

That the destruction of a later will, which itself had revoked a former will, *ipso facto* revives the former will, *Goodright v. Glazier*, (a) *Harwood v. Goodright*, (b) *Usticke v. Bawden*, (c) *Kircud-*

(a) 4 Burr. 2512.

(b) 1 Cowp. 91.

(c) 2 Add. 125.

1844. *bright v. Kircudbright, (a) Welch v. Phillips. (b)*
 February 26th. That, even if it were necessary there should be
 JAMES
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 was abundantly manifest that the deceased did not
 mean to die intestate, because every paper shewed
 an intention to benefit Mr. James and his sister, and
 an equally clear intention not to give an absolute
 moiety of his property to his brother ; that the inten-
 tion in both these respects would be defeated by
 pronouncing for an intestacy.

Addams and Curteis, contra.

SIR H. JENNER FUST.

The deceased in this case is a Mr. Levy Cohen, who died on the 5th day of March, 1842 ; his property amounts to about 6000*l*. At the time of his death his next of kin consisted of a brother and two nieces, of whom one is now Mrs. Alexander, the wife of the Bishop of Jerusalem, the other Miss Levy, spinster. These are the three persons, who, if the deceased has died intestate, will take his property between them.

In the month of June, 1832, the deceased executed a will, the purport of which was to give his stock in trade, the lease of his house, his furniture, plate, linen, and so forth to a Mr. Thomas Hart James, who is the party propounding the papers in this cause. This will is in the deceased's own handwriting ; and there are two signatures, the one in English, the other in Hebrew characters. By a codicil written on the same sheet of paper, and pleaded to have been drawn up on the same day as

(a) 1 Hagg. 327.

(b) 1 Moo. P. C. 299.

will bears date, but to which the date December 18th, 1833, is affixed, the deceased gave the residue of his property between his brother, his sister, Thomas Hart James, and Mary Anne Cohen James, sister of Thomas Hart James, now Mrs. Atterton ; this is signed by Mr. I. Saunders as a witness, on the same sheet of paper. There is a further codicil, dated the 18th of March, 1836, the effect of which is to appoint a friend of the deceased, a Mr. Benjamin Ball, and Thomas Hart James, executors and administrators ; this codicil is signed by the deceased and witnessed by Mr. Saunders.

Now, it appears that Thomas Hart James and his sister, Mrs. Atterton, were not, in fact, related, in the true sense of that word, to the deceased ; they were the grandchildren of his wife ; that Thomas Hart James had for some time lived with and assisted the deceased in his business, but died afterwards left him and set up for himself, at which the deceased was at first displeased, but afterwards became reconciled to him, and it certainly does appear, from the evidence in the cause, that he entertained great regard and affection for Thomas Hart James, although he did, at one time, express himself dissatisfied and displeased with his conduct. Mrs. Atterton, it seems, married without the consent of the deceased, at which he also expressed himself displeased ; she had also lived with him, but, of course, left his house, and went to reside with her husband. I think it is sufficiently proved that the deceased did entertain great affection for her also—that he became reconciled to her, and did intend to provide for her ; I think this is clear on the evidence, and by reference to the draft

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1844. of the will executed in October, 1836; most certainly he did not intend to leave her destitute of any provision. By the will of October, 1836, the property of the deceased was to be divided into four equal parts, one to go to his brother; one to his sister, Mrs. Levy; another to Thomas Hart James; and the fourth to Mrs. Atterton. By the first codicil the same division had been made of his residuary property, so far as concerned Thomas Hart James and Mrs. Atterton; each was to have one-fourth, and the former was to have the furniture, plate, linen, china, and articles, and things belonging to the dwelling-house, and he was also to have the stock in trade, but not the debts owing thereon; this is quite sufficient to shew what were the testamentary intentions of the deceased towards each of these two persons. In the month of March, 1836, the deceased executed a memorandum, having been, as the memorandum states, informed by Mr. Saunders, who had witnessed the first will and codicil, and the codicil of 1836, that he had signed some paper or papers giving some portion of his property to Thomas Hart James and his sister, beyond what he had given them by his will, and he thereby declared, that they should have no portion of the residue bequeathed to them until they had brought that into account, and when that, whatever it might be, was brought into account, they were to share in the actual residue: that is the effect of the memorandum which Mr. Morris has produced. In August, 1836, the deceased gave instructions for another will to Mr. Morris, a solicitor, and a draft will has been brought into Court, and the fact of the execution of that will is pleaded, in the allega-

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tion given in by Mr. Cohen, the brother, and it is admitted, on the personal answers of Mr. Thomas Hart James, at least so far as his information and belief goes, that such a will was duly executed. Now, assuming that as against Thomas Hart James such admission would be sufficient proof of the execution of the will; the answers of Mr. James would not be sufficient to bind or dispose of the interest of Mrs. Atterton, his sister, the Court therefore suggested, that the conclusion of the cause ought to be rescinded, in order to afford an opportunity of examining as to the fact of due execution of the will of 1836, Mr. Morris, the solicitor who had prepared that will. Mr. Morris has now been examined, and has proved the execution of a will in the month of October, 1836, the draft of which was already before the Court; the conclusion of his evidence shews, that the will engrossed from this draft having been duly executed was delivered into the possession of the deceased. Upon the death of Mr. Cohen search was made for this will, and the result is, that it cannot be found, it is not forthcoming; and, therefore, it is admitted on all hands, that it must be presumed to have been destroyed by the deceased *animo revocandi*. The question then comes to this, whether this will, having been so executed by the deceased, and being in terms, if not expressly, a revocation of all former wills, a former will revives by the mere act of destruction of this latter instrument, destroyed *animo revocandi*. It is said, that, according to the law of the present day it does revive, on the same ground as, in an old case of *Goodright v. Glazier* (a); it

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(a) 4 Burr. 2512. 1 Cowp. 91.

1844. was held that the cancellation of a will of a later date *ipso facto* revives a will of a former date. I do not understand such a doctrine to be expressly laid down in the case of *Welsh v. Phillips*; (a) and, until corrected by actual decision, I shall hold the law to be, as laid down in *Ustick v. Bawden*, (b) that there is to be no presumption either way; that the question of revival or non-revival must depend upon intention to be gathered from the circumstances of each individual case; that there is no legal presumption either way. That is the law laid down by my predecessor in this Court, and which has been acted upon ever since, and which I must take to be the rule existing at the present day; namely, that the question of revival or non-revival must depend on all the circumstances of each case taken together. What, in this case, is the probable intention of disposition by the deceased at the time the second will was revoked? At the time when the first will was executed, his nearest of kin were a brother, sister, and two nieces; for these nieces he had at that time made no provision, (I am taking the will of 1832,) but then his mother was then living, and she was to take absolutely one-fourth part of the residue. In October 1836, the deceased makes a different disposition of his property, for, by that paper, after giving to Thomas Hart James the several specific things, which, by his former will, he had bequeathed to him, (except book-debts,) he directs and appoints executors and trustees, namely, Benjamin Ball, Thomas Hart James, and the Rev. Alexander, and

(a) 1 Moo. P. C. C. 300.

(b) 2 Add. 125.

he bequeaths to them all the residue of his property, to hold the same, and every part thereof, in trust to convert the same into money, and to apply the proceeds in the following manner; namely, to pay one-fourth of the clear residue to Thomas Hart James; and to stand possessed of the remaining three-fourths, upon trust to lay out and invest the same upon security, and to pay the dividends of one-third thereof to his brother, David Cohen, for life;—so that the brother was to take only a life interest, he having, by the former will, had an absolute interest; and after his death, the principal to be transferred to his two nieces. Then he gives the interest of one other third part to his sister Deborah Levy, for her life, and after her decease to his said two nieces, in equal shares and proportions—the sister only takes a life interest—two fourth parts of the residue of his estate are given to the two nieces after the death of the deceased's brother and sister; the nieces are to take absolute interests; the remaining fourth part is to be paid to Mrs. Atterton, who is there described as the wife of C. Atterton, for her separate use, and at her death to go to her children. By the codicil of 1836, Mr. Ball and Thomas Hart James were appointed sole executors.

It does appear to me, that this will of October 1836, was a very material departure from the will and codicils of 1832 and 1836; by the will of 1836 the brother and sister have only life interests; Mrs. Atterton also has only a life interest, and there is a difference in the executors appointed. The Rev. Mr. Alexander is by the will of 1836 an executor and a trustee for the benefit of his wife, and also of

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the other property devised over after the lives of the parties to whom it is originally given; here then is a great difference in the state of things as regards the will of 1832, and the codicils of 1832 and 1836. The will of 1836, having been executed duly, must be taken as a revocation of the will of 1832, and of the codicils. This will of 1836 is destroyed, and I presume by the deceased; but am I to conjecture, that thereby it was the deceased's intention to revive the will of 1832, and the codicils? The sister, Mrs. Levy, died in 1839; suppose he destroyed his will in consequence of her death, (for, although the time when this last will was destroyed is not positively fixed, yet it was after 1839 that he said, he must alter his will,) and judging from circumstances, I infer, that he meant to alter the will by which his sister had one-fourth of the property for life; her death might be a reasonable ground for altering his then will, although not a reasonable ground for reverting to his former will, by which she had one-fourth absolutely. This is not a question, whether the deceased meant to die testate or intestate, but whether he intended to revive the will and codicils of 1832 and 1836, by the destruction of the will of 1836; it is one thing to say he did not intend to die intestate, and another thing to say that he intended to die testate as to these particular papers. There is no one circumstance from which I can collect the intention to return to these first papers; and I am clear on this point, namely, that the deceased did not intend to restore Mr. Ball and Thomas Hart James as sole executors. Although, by the cancellation of the latter will he may have revoked the appointment of Mr. Alexander

as executor, it by no means follows that thereby he intended to return to his former will. Again, may he not have revoked this last will intending to make a new disposition of part of his property as regarded his nieces? The question really comes to this, whether there are not circumstances such as to leave the Court in no doubt that he did not intend to return to his earlier will. There is one fact to which I must now advert; the earlier will and codicils of the deceased remained uncanceled at the time of his death; and I will take it that he knew them to be in the possession of Thomas Hart James; but there is evidence, that although he knew this, he had applied to him to give up possession of these papers, and that Thomas Hart James had declined to do so; is it not then very probable, that if these papers had been in the possession of the deceased at the time when he made the will of 1836, he would have cancelled them. Now, I have this fact proved by the witnesses, the deceased did apply to Thomas Hart James for the papers in his possession, the deceased wishing to shew them to Mr. Morris, and there can be no doubt, if Morris had seen them at the time, he would have advised of their being cancelled, by tearing off the signatures or otherwise destroying them altogether. There is no inference, because the deceased knew these papers to be in the possession of Thomas Hart James, that, therefore, he intended to revive them; if he had had them in his own possession, and they had been found uncanceled, the effect might have been different, but they were not in his own possession; he had applied to Thomas Hart James for them, and he had de-

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clined or evaded to give them up: I have not, therefore, any inference of law arising from the fact of the deceased having had these papers in his own possession, and having suffered them to remain uncanceled when he destroyed the later will.

The Court would have been glad, if possible, to have pronounced for these papers, because the effect of a contrary decision will be to deprive Mrs. Atterton of any provision from Mr. Cohen. Although she was no relation to the deceased, the Court does not think he would have left her unprovided for in case he had made another will. The circumstance of destruction of the later will of 1836, I consider as not enough to infer intention to revoke the will of 1832, the two wills are not the same; unfortunately, whichever way the Court may decide, the intention of the deceased will be defeated, for I cannot think it was his intention to give a moiety of his property to his brother David Cohen.

The Court is under the necessity of pronouncing under the circumstances of the case, against the validity of the papers now propounded; the effect will be to hold that the deceased is dead intestate.

The Court on a former occasion, looking to all the facts of the case, rescinded the conclusion of the cause to enable the parties to examine Mr. Morris, in order to have full proof of the execution of the later will; certainly with a strong impression at the time, that if the fact of execution was sufficiently proved, the destruction of the later will would not revive the former instruments. The Court having now gone into the evidence of the cause, pronounces

against these papers ; consequently, the deceased is dead intestate ; but it is a case for giving costs out of the estate.

It is a very hard case, but, upon the circumstances, the Court thinks it right and fit to do as it has just done.

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COVENTRY *against* WILLIAMS.

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THE Right Honorable GEORGE WILLIAM Earl of COVENTRY died on the 15th of May, 1843. The deceased had made a will and the several other papers hereinafter propounded as codicils. The surviving executor having renounced probate, administration, with the will and one codicil, dated respectively the 25th and 26th days of May, 1835, was prayed by the Hon. William James Coventry, the brother of the deceased.

Paper, propounded as a codicil, rejected, as not being *per se* of a testamentary character, and the internal defect of the instrument not being supplied by evidence.

Other parties appeared, claiming to be interested as legatees named in the other codicils or testamentary papers which bore date respectively the 27th of September, 1836, the 1st of August, 1840, and the 18th of November, 1840. The several papers were propounded in separate allegations.

On the 19th of July, 1843, letters of administration, with the will and first codicil, were granted, under the usual security, to the Hon. William James Coventry, the other parties consenting thereto ; the consideration as to the validity of the remaining scripts being reserved.

The three causes relating to the remaining scripts

The *Queen's Advocate* and *R. Phillimore* on
behalf of Mr. Coventry.

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This paper is not testamentary either in form or language ; it does not purport to dispose of property after the death of the party. There are no words denoting future gift ; it is a mere security or promise to make another instrument of a testamentary character, as distinguished from the character of this instrument. If this paper was intended to be a valid codicil there could be no occasion for a further instrument ; if a further instrument of a different character and nature was requisite, this is not a testamentary paper. The parties who are to provide the funds to pay this annuity are the testator's bankers, not his executors or administrators ; after the death of Lord Coventry, his account with Messrs. Coutts would be wound up and closed. They cited *K. Proctor v. Daines* (a), *Griffin v. Gerard*. (b)

Addams, in support of the paper.

This is a valid codicil to all intents and purposes. The deceased may have intended in the first instance to make this as a provisional instrument ; but still he considered it as capable of being made a valid codicil ; the presence of one witness, Dr. Chambers, suggested to the mind of the deceased, that it would be better at once to execute the paper in the strict legal testamentary form, in case of his death before more formal instrument was prepared ; it was to

(a) 3 Hagg. 218.

(b) 1 Curt. 98.

1844. stand good, if he did not execute another codicil in
 February 28th. conformity with this paper. Where was the necessity
 for taking so much trouble to comply with the complex requisites of the Wills Act, if this paper was to have no operation ; if it was to be nothing more than a mere voluntary promise ; a bare acknowledgment of what the deceased proposed to do what was the necessity for signing a bare memorandum in the presence of two witnesses present at the same time, and causing them to subscribe it in his presence ?

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SIR H. JENNER FUST.

The only question remaining to be determined in these causes relating to the testamentary papers of the late Earl of Coventry, is with regard to a paper, dated the 18th of November, 1840, propounded as a codicil by Mrs. Chase. The purport or contents of this paper are as follows. [The Court read it.] Two objections are raised to this paper, first, as to the character of the instrument itself ; secondly, as to its due execution.

The first question to be considered is, what is the legal character of the paper ? Now upon the face of it, it does not purport to be testamentary ; it does not purport to be the paper, under which this lady is to take an annuity of 50*l.* ; it clearly does not speak of an act done, but of an act to be done, and that, not by the deceased, but by Mr. Morland, who had drawn his will.

Now, I apprehend it to be incumbent on a party setting up a paper as testamentary, to shew, by the contents of the paper itself, or by extrinsic evidence, that it is of that character and nature ; that by the

very identical paper the party deceased has given, or intended to give, or supposed himself to have given, the particular legacy or bounty claimed. If the paper purports of itself to be testamentary, the party who opposes its admission to probate, must, in order to get rid of it, shew to this Court, that it was not made *animo testandi*; if the purport be equivocal, it must be shewn, by the party setting it up, that it was made *animo testandi*. I am clearly of opinion, that this paper is not testamentary in itself, it is only to have operation and effect by the instrumentality of some other document; the deceased is to give orders to Mr. Morland to make that which is to be the effective instrument. I am the more inclined to this opinion, by this circumstance; the codicil of 1840 commences in these words; "This is another codicil to my will,"—a special and direct declaration that that very instrument is a codicil to his will: this also is the expression made use of in another paper, dated in the year 1836, "This is a codicil to my will." These two papers are therefore both very differently described from that now under consideration, which purports not to be an act done at the moment, but indicates an intention to give instructions to a solicitor to prepare a codicil to such and such effect: Upon the face of this instrument there is nothing Testamentary.

Then is there any extrinsic evidence, that the deceased did intend this paper to operate as a codicil? I can find none; indeed there is one striking circumstance to the contrary, appearing on the evidence of the attesting witnesses, namely, neither of them, at the time of attesting, had any notion that they were witnessing a codicil. The

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whole evidence of Marchant shews, that at the time of witnessing this paper, he did not know it was a codicil; he so states at nearly the commencement of his deposition; again, to the twelfth Interrogatory, "I had no knowledge at the time of the contents or purport of the said paper, nor that it was a codicil." The evidence does not supply what is deficient on the face of the paper itself. The other witness, Dr. Chambers, says, in his examination in chief, that he was in attendance on Mrs. Chase, then staying at Lord Coventry's house; that, agreeably to a request from his Lordship, he called at the house, and found Mrs. Chase and his Lordship sitting in the dining-room. That after conversing with them for some time, Lord Coventry said, speaking to Mrs. Chase, "as Chambers is here, I may as well get him to sign this paper," and he thereupon got up and went to his writing-table, and took from a drawer a paper, and read its contents; the purport of it was to bequeath,—*bequeath* is the expression the witness uses—an annuity of 50*l.* a-year to Mrs. Chase. He says, "I further recollect that his lordship said, the annuity was to be continued to her little boy."—Then he goes on to state, that Marchant was called in, the deceased having signed the paper before Marchant came into the room; and then he says, "upon Marchant coming in Lord Coventry desired him to sign his name to the paper, which Marchant did in the presence of Lord Coventry and of me; Mrs. Chase being also present. Marchant having signed it, withdrew. My present belief is, that I did not sign the paper until after Marchant left the room, because I have some recollection of having

mentioned to Marchant as I was leaving the house, that I also had signed the paper."

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In answer to the first additional Interrogatory, the same witness says, "Whilst Lord Coventry was in the act of signing his name to the codicil in question, he mentioned to me the purport of its contents." In answer to the second Interrogatory, he states the manner in which the paper was executed and attested. To the third, he says, "I have before stated the manner in which I was asked to witness the said codicil; my signing was, in part, at my own suggestion, on account of Lord Coventry having, in the first instance, said, that he might as well sign the codicil whilst I was there. I have no recollection of Lord Coventry having, in exact terms, called the paper in question a codicil to his will; he did not ask me to sign it as being a codicil: I did not, (being unacquainted with the legal operation of similar papers,) know that such paper would take effect as a codicil to his will. I had no doubt of the validity of the paper to effect whatever might be thereby intended by Lord Coventry."

In answer to the twelfth Interrogatory, "It was the impression on my mind, at the time of signing and witnessing the said paper, that it was not more than a memorandum or security to Mrs. Chase, that his Lordship would make her the allowance therein mentioned. I considered the annuity mentioned was already in course of payment, and not postponed until his Lordship's death. After I had witnessed the paper, Lord Coventry handed it to Mrs. Chase, saying, "that is a sufficient security to you," and she then folded it up, and placed it in

1844. her bosom. Lord Coventry also said to Mrs. Chase, —
 February 28th. “I will speak to Morland about it.”—Here then is
 COVENTRY the same intention deposed to, as is manifested or
 against the paper itself, namely, that the deceased was to
 WILLIAMS. speak to Morland respecting it. Dr. Chamber
 says, to the same Interrogatory, “Had I suppose
 that my signature to the said paper would have
 given it validity as a codicil, I should not for
 moment have hesitated to sign it, on being re-
 quested by Lord Coventry to do so.”

This is the evidence of the two witnesses, the
 only persons present at this transaction; they
 cannot say that the deceased signed this paper as
 codicil to his will; the impression on the mind
 Dr. Chambers is, that it was a mere security to
 Mrs. Chase, that Lord Coventry would make such
 a codicil; that he would speak to Morland about
 it. There is nothing, as it appears to me, to supply
 the deficiency in the character of the paper; the
 evidence in that respect decidedly fails.

Then the question arises, whether the delivery of
 this paper to Mrs. Chase is sufficient to supply
 what is wanting in its internal character; I am of
 opinion it is not; I do not think it was, as sug-
 gested in argument, a provisional paper, intended
 to operate in case the deceased did not make one of
 a more formal nature.

It has been said, that the impression of the
 witnesses, as to its character, could not affect the
 nature of the paper, and that it may, notwith-
 standing their impression, be a codicil. Un-
 doubtedly it may; but where there is no internal
 evidence, from the paper itself, that it was intended
 to be testamentary, it is essential that the extrinsic

evidence should supply that which is necessary to give it a testamentary character.

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Addams.—The attention of the legal advisers of Mrs. Chase was never called to this point. This paper was pleaded as a codicil ; no objection as to its testamentary character was taken ; issue was joined as to whether it was duly executed. I never recollect an objection of this kind taken at this stage of the cause ; if the paper was not testamentary the allegation propounding it ought to have been opposed, then there would have been an opportunity to have pleaded any special circumstances.

Per Curiam.—You plead this paper, first, as a codicil, next as duly executed, must not *the Court* be satisfied, that it is a codicil before admitting it to probate ?

Addams.—I should wish to have an opportunity of considering the point : it has come rather by surprise on Mrs. Chase's legal advisers.

Per Curiam.—Let the case stand over for that purpose.

This cause came on to be spoken to.

June 19th.

The Court, after hearing *Addams*, remained of its former opinion, and rejected the paper.

CONSISTORY COURT OF LONDON.

1844.

PHILLIPS *against* PHILLIPS.

April 30th.

A libel in a suit of divorce, pleaded a report of the result of an investigation into the conduct of the wife, as if made verbally to the husband. At the hearing of the cause, it appeared that the communication was in writing; the Court thereupon rescinded the conclusion of the cause, in order that this document might be properly pleaded; this was done, and publication passed a second time.

Held, that it was not competent to the wife to give in an allegation pleading certain facts connected with the written report; *first*, because the necessity for such plea was equally apparent whether the report was verbal or in writing; *secondly*, because such plea should have been asserted before publication passed the second time.

THIS was a suit of divorce, by reason of adultery promoted by the husband against his wife.

A libel was given in, and, after debate, admitted. Witnesses were examined; the proctor for the wife declared that he gave no defensive allegation; whereupon publication passed, and the cause assigned for sentence.

The libel, *inter alia*, pleaded, that the husband some time before the commission of the adultery imputed against the wife, had had his suspicions roused as to the infidelity of his wife, and had caused an inquiry to be made into her conduct by two confidential friends, who, (as pleaded in the libel,) "reported to him that she was innocent." At the hearing of the cause, it appeared upon the evidence that the result of this inquiry was made known to the husband in the form of a written report. The Court thereupon rescinded the conclusion of the cause, in order that this written report might be pleaded and annexed in additional articles. This having been done, publication passed at the prayer of the proctor of the husband; the proctor of the wife being present, and not opposing.

On behalf of the wife an allegation was now

offered, counterpleading some of the statements of the libel as connected with the result of the investigation. 1844.
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The admission of this allegation was opposed by PHILLIPS
against
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Haggard and R. Phillimore.

Addams and Robinson in support.

DR. LUSHINGTON.

The Court has now to determine on the admissibility of an allegation offered at a very late period of this cause; I apprehend, independent of the technical objection as to the precise time at which the allegation is offered, it being after the Court has rescinded the conclusion of the cause—that the first and substantial objection to its admission is, that it contains matter which might and ought to have been pleaded in answer to the ninth article of the libel, the initiatory plea in the cause.

I think I must consider the question in two points of view; first, whether this allegation might not with equal propriety have been presented to the Court in answer to the *ninth* Article; secondly, whether circumstances have occurred at the hearing of the cause or since, affording any justification for offering the allegation at this late period, when, by the ordinary rules of the Court, there would be no opportunity of doing so.

Now, the *ninth* Article pleads,—“ That the cause of the wife quitting her husband’s house, on or before the 1st day of January, 1840, having become known to their relations and friends, a reference was made, through their interposition and advice,

1844. to two of their friends, confidentially to inquire
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 PHILLIPS wife, who, upon an investigation of the circum-
 against stances relating to the same, reported to the said
 PHILLIPS. husband on or about the 28th of January, 1840, the
 conviction that she was innocent of any criminal
 conduct, and they advised him to receive her back
 again : that the husband believing the result of such
 investigation to be true, on or about the 29th
 of January, 1840, received his wife back again."

Dismissing for a moment all consideration of the
 defect or omission in the form of this plea, in
 substance it is as follows,—the husband having his
 suspicions roused, caused an investigation into the
 conduct of his wife to be made by two of his friends,
 and received from them the result of that investigation ;
 and, on faith of their judgment, took his
 wife back. The allegation now under consideration
 pleads as follows,—“That the wife accompanied by
 her sister went to the residence of her mother, and
 returned therefrom, accompanied by her said sister
 and mother ; and, in the morning of Saturday the
 25th of the month of January, went to the residence
 of, and saw and conversed with her husband, and
 together with her mother, stayed with him several
 hours ; and, on the morning of the following day, to
 wit, Sunday, the 26th, her husband, as it had been ar-
 ranged that he should do so on the day preceding, went
 to the lodgings of the wife, and remained with her
 there for several hours ; and, on the next day, to wit,
 Monday the 27th, the wife, with her husband's perfect
 approbation and concurrence, returned home to his
 house, and she and her husband slept together at
 his house on the night of the said Monday, and

thenceforth lived and cohabited together until their separation in the month of October, 1842." What is the effect of this plea? In substance it assumes to contradict the *ninth* Article of the libel, by shewing that previously to the receipt of the report, the husband received back his wife, and the cohabitation between them was renewed; in other words, that it was not on the faith of the investigation, or on reliance of the report of her innocence, that the wife was taken back; because this had already taken place before the investigation was concluded, or the result made known. I am clearly of opinion, that this allegation is substantially neither more nor less than an answer to the *ninth* Article of the libel, and would have been admissible in answer to it; and I am not at present able to see why it was not offered at the proper time, and in the proper shape of an allegation responsive to that *ninth* Article; I cannot myself see any such want of explicitness or of definite statement in the libel, as that the wife had not ample opportunity of alleging these facts before the first publication in the cause; the dates are sufficiently explicit, indeed more so than often happens in these cases; they are as explicit as possible—"on or about the 28th"—"on or about the 29th."—Surely, if the wife had any intention of alleging, that the report was not the foundation of her being taken back, she has had ample opportunity of doing so. For the reasons I have now stated, as to the first point in the case, my mind is entirely made up to this result,—that the allegation now offered, might with the same facility have been offered at an earlier period.

The second question is, whether anything which

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occurred at the hearing, or was then done by the Court, can give to the wife the opportunity of bringing in this plea, the right to do which she had forfeited by previous omission? Now what occurred at the hearing of the cause was shortly this;—looking to the *ninth* Article of the libel, I found it there stated—that the friends to whom the reference had been made had *reported* so and so—here arose the whole difficulty; the term was ambiguous—“*reported*”—of course, so far as the wife was concerned, originally it mattered not whether that report was made verbally or in writing, but when the cause came on to be heard, and it appeared, that the *report was in writing*, was not a mere verbal report, the Court, according to all established rules of evidence, could not receive the oral testimony of witnesses as evidence of the contents of a written document, in the power of the party, and which was neither alleged to have been lost or destroyed;—the Court had no alternative, but to reject the evidence, or rescind the conclusion of the cause. It is greatly to be lamented that the libel was so originally drawn, the party having the document in his pocket; because the counsel of the wife were misled, and did not take an objection, which must have prevailed, if the report had been pleaded to be in writing, and had not been annexed, or a statement made that it had been lost or mislaid; the article would clearly have been objectionable, and must have been reformed. But the misleading occasioned by the *ninth* Article, does not go to justify the present plea, for the report, whether in writing or verbal, equally required contradiction. Under the above circumstances I fo-

red the rule which has been usually adopted in
s Court ; of course, I did not admit the evidence,
t I rescinded the conclusion of the cause for the
rpose of bringing in the document, which was
mitted to be in existence. Does that circumstance
the slightest degree make any alteration in favour
the wife ? I apprehend none whatever. The
cinding the conclusion of the cause was a mere
tter of form, in order to keep the proceedings
ular, and to get at the real truth and justice of
case.

Upon these grounds I feel no hesitation in
ing—that it is my duty to reject this allegation ;
hing could be more inconvenient than when
nesses have been examined to certain facts, and
whole evidence in the cause is known ; where
nesses have been re-examined merely to prove
dwriting, to permit of additional facts and
dence. If this course were allowed there never
uld be an end to the proceedings in a cause, and
ead of tending to elucidate the truth it would
d to choke it.

This allegation is offered too late ; if it was
ended to give in any allegation at all, it should
ve been tendered before publication, as responsive
the additional articles of the libel, instead of
iting until publication has passed ; it is impossible
admit this allegation, and I reject it.

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was given for Hilary Term, 1833, and the cause was appointed for trial. Mr. and Mrs. Merryweather thereupon presented a petition to the Court of Chancery, praying, that the order for the trial of the issue might be discharged, they undertaking to admit the validity of the will and codicil, and submitting to have the trusts thereof performed, and carried into execution under the direction of the Court. On the 14th February, 1833, this petition came on to be heard with the cause, when the Master of the Rolls discharged the order for the trial of the issue which had been obtained by the executors, and, on the application of Mr. and Mrs. Merryweather, and on their admissions to that effect, declared the will and codicil to be well proved; and that the same ought to be established and carried into effect.

This last decree had been acted upon from that time; and between 6000*l.* and 7000*l.* had been paid to Mrs. Merryweather on account of the annuity.

In Hilary Term, 1830, an action of ejectment was brought by Mr. and Mrs. Mereweather, as the plaintiffs therein; in effect impeaching the validity of the will; the action was defended; and was set down for trial before a special jury, but was discontinued by the plaintiffs, who were thereupon ordered to pay the costs consequent on the discontinuance.

On the day of a decree was extracted from this Court, calling upon the executors of Mr. William Turner, deceased, to bring in the probate of this will and codicil and to prove the same in solemn form of law; or otherwise, to shew cause why such probate should not be revoked, and

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legacy of 400*l.* for himself, in addition to 100*l.* given to him by the will ; a legacy of 200*l.* for his mother, and 20*l.* a piece for two of his aunts ; and, for the sister of the deceased's late wife, 150*l.*, in addition to a legacy of 50*l.* by the will ; and for the brother of another of the executors, 50*l.* But all these facts, at least, were apparent on the face of the will and codicil themselves ; the instruments themselves would furnish this information ; how, then, can this be a ground on which the executors can now be called on to contest the validity of this will, and not at an earlier period ?

A second reason is, that the parties were placed under circumstances of great disadvantage by the conduct of the issue having been given to the executors ; no doubt they were not in so advantageous a position as if the children had been the plaintiffs ; but it was on this very ground, that the application was made to the Master of the Rolls to allow the executors to attend the trial ; it is very probable that they wished the trial to come on between themselves and their children ; but, surely, it was a very reasonable precaution to take, where an issue was directed to be tried between infant children and their parents. The statement goes on to allege, that before Mr. and Mrs. Merryweather consented to make the admission as to the will, they were advised, that their so consenting would in no way debar them from disputing the validity of the will and codicil in this Court, if at any future period they should discover new evidence tending to invalidate them ; and in proof of this they refer to a letter dated 1829, written by the Proctor to their solicitors ; but this letter only refers to what

ould be the consequences of withdrawing the
aveat, or not complying with the assignation of
his Court; no doubt this was sound and good
advice; but still it has nothing to do with a consent
to make the admission in the Court of Chancery on
which the will was declared to be well proved.

A fourth reason is, that it is only within the last
four months that the parties have obtained from
some of the servants, who are no longer in the pay
and under the control of the executors, such new
evidence as will prove the will and codicil to have
been obtained by fraud, at a time when the deceased
was wholly incapable of performing any rational
act whatever. Surely, with due diligence, they
might have informed themselves of this at an
earlier period; none of these servants continued in
the service of the executors for more than fifteen
months after the decease of the testator!

The fifth reason amounts to a point of law,
namely, that Mrs. Merryweather was not examined,
nor was her answer taken separately and apart from
her husband; and therefore it is contended, she is
not precluded from now disputing the validity of
the will in that Court, notwithstanding the admis-
sion contained in that answer:—why this is a ques-
tion as to the practice of the Court of Chancery, on
which this Court can form no opinion whatever.

Now these are the reasons assigned in the answer
to the act on petition, for calling in this probate,
and why the parties are not now barred from taking
this step. The executors state in reply what took
place with respect to the servants, and it seems, that
one of them only was taken into the service of one
of the executors, and she only remained there for

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twelve months ; she has made an affidavit, but she does not state when exactly she left the service. I must say the statement in the answer to the act is very disengenuous in this respect, for it merely states these servants to have been in the service of the executors, without specifying the length of time they remained, or when they quitted or were discharged ; the executors say that the servant Jupp was discharged twelve months after she was hired, and that all the other servants were merely retained until the sale of the household furniture and effects, and were then discharged, excepting the gardener, who was retained until the year 1832, when the deceased's house was let or sold ; so that the whole of this statement amounts to this,—that one servant did remain in the service of Mr. Joseph Turner, one of the executors, for a period of about twelve months.

The rejoinder to the act asserts in positive terms, that all the servants of the deceased were bought over by the executors by the promise of legacies ; that Mr. and Mrs. Merryweather were compelled to quit the deceased's house after the funeral ; that the servants conducted themselves in so violent and abusive a manner towards them, that they could not venture to approach these parties, and were thus unable to obtain that information which was solely within their knowledge ; and, without which, the said will and codicil could not be opposed with success.—I must say, I cannot look on this as a reason why the will and codicil should not have been opposed in the first instance.

These are the circumstances stated in the several stages of the act on petition ; but the affidavit of

Mr. and Mrs. Merryweather goes further than the act, and states some additional circumstances ; these could not be known to the executors, until the affidavits were exchanged ; otherwise the Court would have expected, indeed, would have thought it necessary, that the executors should have given a denial or some explanation of them ; for instance, as to the charge of Mr. and Mrs. Merryweather not having access to the house and ground.

It is very improper that such allegations should be made in affidavits, when they are not to be found in the act on petition, the other parties could not be expected to answer that which was not in the act on petition ; had these facts been pleaded, I should have wished to have had a denial from the executors, to the effect, at least, that they had not given orders for such conduct : still this can have no weight whatever in determining whether the Court is to call in the probate of this will and codicil, and to put the parties on solemn proof of them. Now I fully admit that executors are bound to prove a will by solemn form of law, where they are called on to do so by those entitled in case of an intestacy ; and that, under common and general circumstances, neither lapse of time, nor the receipt of a legacy, nor acquiescence in the will, will be sufficient to debar them that right ; but after so great a lapse of time, as in this case, fourteen years after the transaction in question, and ten years after the will has been declared to be well proved in Chancery, may parties not be barred of their remedy if there be no reasonable ground accounting for the delay ?

Now cases have been referred to ; *Newell v.*

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Weeks (a) and *Hoffman v. White* (b). In both cases the question was as to the right of parties to call upon executors to prove a will in solemn form of law, that is, whether the right to do so was barred under the particular circumstances. That first case was somewhat of a different description from the present; it was, whether a party cognizant of proceedings to prove a will, although not formally made a party thereto, was at liberty to contest that will at a subsequent time; the Court held that he was not so entitled; that, although not a formal party, he knew of all the proceedings, he having had consultations with the legal advisers of the party actually contesting it; the Court held, that it was not competent to that party by a new suit to call upon executors to propound the will.

The other case, (*Hoffman v. White*), annexed in a note to the former case, approaches much nearer to the circumstances of the present case. A testator died in 1795, his will was proved in March 1795, a suit was instituted in Chancery to obtain an account; the validity of the will was admitted in that suit. In 1796, a decree was made for an account; the brother of the deceased, in the course of the proceedings claimed a legacy as having lapsed; the Court declared, that the legacy was lapsed, and the brother entitled to one-third of a moiety thereof. In 1804, a decree was taken out in this Court, by the brother against the executor of the deceased; in giving judgment on the case, Sir W. Wynne said, "There can be no doubt, as a brother, he is entitled to controvert the will; and, if probate has been obtained in common form, he

(a) 2 Phill. 224

(b) *Ib.* 230, n.

can call it in, and put the executor on proof. I do not know that there is any specific time which limits a party. The will had been proved in 1795 ; this decree was taken out in 1804 ;—so there has been a quiet possession for nine years. I think I know instances in which the Court has allowed the probate to be called in after a longer time, that may be done with cause shewn ;—that it may be done under any circumstances is what I cannot admit ;—it would be contrary to reason and every principle of justice. Where the opposing party has been in a situation which rendered it impossible or difficult for him to have proceeded earlier ; if he has been absent from the country, a minor, or labouring under imbecility, he may be admitted. But without reason, and where there are such strong reasons as there are here to shew that he was not in such a state of incapacity as to have prevented him, and further, that he could not be ignorant of all the circumstances relating to the deceased, from the suit in Chancery, soon after the probate was taken out, the case is different. By his answers, he admitted both the will and probate ; a decree was made operating upon the lapsed legacy ; and he acted under that decree, not upon an intestacy, and continued to receive the interest for five years together.” The ground or principle, on which the Court proceeded in that case, was, that the party was not barred by the lapse of time, if he could shew good reason why he had not proceeded at an earlier period ; it affirms this principle, that if he does not shew good cause, this Court, unless pressed by superior authority, will not allow him to call in a will after such a lapse of time.

In that case, the objection was taken by protest ;

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in the present instance, it is submitted in act on petition; the latter is I think the proper course. No doubt the Court has jurisdiction in such matter, and may exercise its discretion. There is another case, *Bell v. Armstrong* (a), that turned upon the right of a next of kin to call upon executors to prove a will in solemn form of law. There were peculiar circumstances in that case; two codicils to the will had been opposed by the executor named in the will, and he had succeeded in obtaining a decree against both of them, by reason of the deceased's incapacity. Now, if these codicils, or either of them, had been established, there would have been an end of any possible interest that the next of kin could have had to impugn the will; the next of kin had therefore no interest at an earlier period in questioning the will which he had acquiesced in, by allowing it to be taken in common form, and receiving a legacy bequeathed by it. Sir J. Nicholl was of opinion, that, under these circumstances, the next of kin had a right to put the executor on proof of the will in solemn form of law; and he distinctly laid it down that the right will not be barred, by acquiescence, by the receipt of a legacy, nor by lapse of time. The doctrine established in this case was very recently affirmed by the Judicial Committee of the Privy Council, in a case brought up on appeal from the Archi-episcopal Court of York, (*Bell v. Raisbeck*, 20th of February, ult.,) the question was raised on the admission of an allegation, and the Judicial Committee was of opinion that the right to call for solemn proof of a will was not barred by lapse of time. The circumstances of that case were very peculiar; the

(a) 1 Add. 365.

will in question was dated in the month of November, 1823, the brother of the deceased was appointed the sole executor, indeed, he was almost the universal legatee, for there were only one or two trifling legacies to servants. The will was proved in the Court of York, on the 15th of January, 1834, by the brother, the sole executor, he died in December, 1839, having made his will and appointed three executors, who proved his will in the same Court, in June, 1840. A decree was taken out in July, 1842, calling in probate of the will of November, 1823, and the decree was directed to the executors of the brother of the original deceased; there had been no proceedings against the brother in his lifetime. The circumstances were such as not to create a very favourable impression, but the allegation was admitted, and the proceedings are now going on. The principle, whether the next of kin had a right to call on the executors of the brother to prove the will of his testator in solemn form, after this lapse of time, was argued, the admission of the allegation confirmed the right of the next of kin to call upon the executors so to prove.

But then, in the present case, this circumstance is to be taken into consideration, namely, the will was decreed to be well proved upon the answer of the parties admitting it as a fact; the averment, however, in the act on petition, is, that notwithstanding this admission, if the answer of the heiress-at-law was not taken separate and apart from her husband, she is not debarred from now contesting the will:—the words are these—“That inasmuch as the said Mary Ann Merryweather

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was not examined, nor her answer taken separately and apart from her husband in the Court of Chancery, she is not precluded from again disputing the validity of the will in the *said Court*, notwithstanding the admissions contained in the said answer." A case was cited in which this point is said to have been decided to this effect by Sir J. Wigram, *Brown v. Hayward* (a).

Then it is the practice of the Court of Chancery which is here stated ;—well, if that be so, let the parties go to the Court of Chancery, and obtain another issue.

It may be that such is the practice of the Court of Chancery ; but I have this fact, the will has been declared to be well proved, upon the undertaking of the parties to make such admission ; it was not an admission simply in an answer, but after the answer of the parties had been given in ; after an issue had been ordered to try the validity of the will ; after the carriage of the issue had been taken out of the hands of the plaintiffs, under whose management the record had been, on a former occasion, withdrawn, and the trial lost. All this is nowhere denied ; I find no complaint as to the conduct of the issue being given to the executors ; it cannot, I think, be denied it was a wise precaution to prevent the possibility of the will being collusively pronounced against. Under the terms of the last order, the trial was about to proceed, when the parties prayed that the order might be discharged, and this is done upon their own undertaking to admit the will to be well proved.

It seems to me, that if the facts be so, the parties

(a) 1 Hare, 432.

may go to the Court of Chancery, and try the question,—whether they are now precluded from disputing the validity of this will as to the real estate ; or the executors may apply for a perpetual injunction, and so try the question.

Then let these parties proceed in Chancery or at common law, and, if they succeed in either of those Courts, they can come again to this Court ; but I do not think it is for this Court to authorize any step tending to such a proceeding.

I do not wish it to be understood, that in this case I am at all trenching upon the principle of the full right of next of kin, to call upon executors to prove a will in solemn form, notwithstanding there shall have been lapse of time,—notwithstanding acquiescence,—notwithstanding the receipt of a legacy ; but that the Court proceeds on this ground, that, in this case, the Court of Chancery, on the express petition of the parties, and not on a mere admission in answer, has declared this will to be well proved :—I am asked to undo all that has been done by the Court of Chancery.

I am of opinion, that this case is fully distinguished from the cases cited, in which the parties were allowed to proceed after lapse of time, to call upon executors to prove in solemn form of law. Being of this opinion, I shall pronounce for the prayer of the executors, which objects to the enforcement of this decree against them, and shall dismiss them from its effect.

I shall make no order as to costs ; the executors were fully aware that this will was impugned ; a caveat was entered in this Court, and much litigation took place in the Court of Chancery respecting the

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will. The executors might have proceeded to prove the will in this Court in solemn form of law. Executors have always a remedy against such a proceeding as this in their own hands.

Addams.—Will the Court order the executors their costs out of the estate? I apprehend the Court can make such an order.

SIR H. JENNER FUST.—Yes. I have no objection to make that order.

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Will of a soldier made when quartered with his regiment in barracks at New Brunswick, and who died there, not admitted to probate, not being executed according to the 9th section of the 1 Vict. c. 26, and not being within the exception contained in the 11th section.

WHITE v. REPTON.

THE Honourable I. H. Pery died at St. John's, New Brunswick, on the 6th of August, 1842. The deceased at that time held a commission in her Majesty's army, and was quartered in barracks with his regiment. A will, made by the deceased, signed by him, but attested by only one witness, was propounded in an allegation which pleaded (*fifth Article*), "That the deceased, at the time he made and executed his said will, and at the time of his death, was a captain in her Majesty's 30th regiment of foot, and had the command of a company of the said regiment, and was quartered in barracks at St. John's, in New Brunswick; and therefore, and by reason of the premises, he the said deceased was a soldier in actual military service, according to the true intent and meaning of the 1 Vict. c. 26, s. 11."

The admission of the allegation was opposed by

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This question was settled in *Drummond v. Parish* (a), in which the Court considered all the principal authorities which could be brought to bear on this subject. In addition to those then cited, the following may be added in confirmation of the decision of the Court. *Godolphin*, in the *Orphan's Legacy*, c. 5, p. 16, says, "Let it not here escape our observation, that these privileges belong only to such soldiers as are in expedition, or actual service of war, and not to such as lie safely and securely in some castle, garrison, or other like place of defence," *Gaill*, in his *Pract. Obs.* Lib. II. Obs. 118, p. 563, says, "*Itaque, ut ad propositum revertar, ad otiosos milites hoc privilegium non pertinet, sed ad eos, qui sunt in castris, et in præsentis periculo hostium; utrobique adversus præscriptionem succurritur militibus in expeditione degentibus, non otiosis, et domi existentibus. Atque ita in terminis, quoad limitaneos et stationarios milites, concludit Zasius, jure communi testari debere, cum sint extra periculum belli, et peritiores consulere, pluresque testes adhibere possint.*" To the same effect will be found *Hotomanus* (p. 108); *Mynsinger*, Resp. Jur. 46, s. 8, p. 415; *Denisart*, Test. Mil. vol. 4th, p. 716; *Pothier*, Des Test. vol. 5th, p. 485.

Heineccius "De Milit. Test. Lib. II. tit. xi. sec. 56. "*Deinde ex eadem privilegii causa patet, quando eo privilegio uti possint homines. Glossa distinguit, sintne milites in acie constituti, an in castris, an in*

(a) *Ante*, 522.

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The *Queen's Advocate* and *Twiss*, in support of the allegation, referred to the following authorities. —*Cujacius*. Lib. 19. Quæst. Papin. vol. 1, pt. 2, p. 525; *Julius Clarus*, Lib. 3, tit. “*Testamentum*,” Quæst. 15. “*In expeditione autem milites occupati, degere dicuntur, non solum cum sunt in procinctu, in acie, in hostico, id est, in ipso armorum strepitu, et summo vitæ discrimine; verum etiam, cum sunt in castris, sive (quod idem est) in fossatis, in stativis, in hybernis, in custodiis, in præsidiiis. Alioquin nihil distaret paganus a milite. Præterea, hic addendum: milites limitaneos, qui nimirum in hostium finitimis locis, ad repentinas illorum incursiones intenti sunt, et præsidarios sive stationarios, qui ad provinciæ alicujus quietem aluntur, privilegiis militum merito quoque gaudere, ita ut jure militari, omissis juris solemnibus, testari possint.*”

Per Curiam.—You must make out a distinction

between a soldier in Woolwich barracks, and a soldier in barracks at New Brunswick.

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WHITE
against
REPTON.

[*Argument.*]—the one is *at home* the *other abroad*.

Per Curiam.—What do you say as to the present Wills Act extending to New Brunswick.

[*Argument.*]—That is a question not yet decided, but it is apprehended that a soldier, wherever quartered, is considered as domiciled in this country.

The authorities recognise a distinction between wills made in the mother country and in a colony. *Bocerus*, De Bello, p. 211; *Enenkelius* De Priv. Milit. p. 127. *Puffendorf*, in his Obs. Jur. Univ. vol. 3, p. 499, states the following case :—“ A general in the Dutch army made his will, when setting out for Surinam, without due formalities ; he died two years afterwards in the colony ; will held to be valid.”

The statutes 13 & 14 Car. 2, c. 3, s. 7 ; 1 Geo. 4, c. 19, s. 115, and 6 & 7 Wm. 4, c. 93, s. 5, distinguish between soldiers in active service and those in training or exercise.

SIR HERBERT JENNER FUST.

The single question is this.—Is there any distinction between this case and that of General Drummond ? The only difference I can see, is, the one was in a colony, the other at Woolwich. I do not think this difference creates a distinction. Allegation rejected.

ARCHES COURT OF CANTERBURY.

The office of the Judge promoted by BURDER

v. ———.

1844.

May 31st.

An Ecclesiastical Court may entertain a suit against a clergyman for the purpose of deprivation or suspension from his ecclesiastical preferment, by reason of a public scandal existing against him ; although the scandal originates from a charge which, if true, would constitute a criminal offence cognizable solely in a common Law Court ; and although no conviction by the Common Law is pleaded.

On the 9th of December, 1843, a decree, founded on Letters of Request from the Bishop of ———, issued from this Court, directed to the Reverend ———, to appear and answer to certain articles, heads, positions, or interrogatories, touching and concerning the deprivation or suspension of him from his ecclesiastical offices and preferments, of Priest, Vicar, or Minor Canon of the Cathedral Church of ——— in the city and diocese of ——— and within the province of Canterbury, and also from all his ecclesiastical offices and preferments, in and throughout the said province, by reason of his immoralities, lewdness, incontinence, ——— practices, habits, and propensities, causing great scandal to the Church, to be administered to him by virtue of office, at the voluntary promotion of the said John Burder.

The party cited having appeared, articles were brought in and were opposed.

Addams and *Elphinstone* in objection to the Articles.

This Court is incompetent to try the charge on which this suit is founded, and is therefore prohibited from entertaining the suit. Temporal

offences, of whatever nature they be, are not examinable in the Spiritual Courts, which decide on written evidence; if this Court has jurisdiction in a case of this nature, so has every Archdeacon. The law is this, as regards a temporal crime committed by a layman, this Court can take no cognizance whatever, either for examining into a charge, or punishing a party if convicted in a temporal Court; as regards a clergyman, the Court has no jurisdiction to examine into a temporal crime of this nature, in the first instance, but if the party be convicted in a temporal Court, there arises, out of that conviction, a fame or scandal, which the Ecclesiastical Court may take cognizance of in order to found a suit for punishing the party by Ecclesiastical censures, by suspension, or by deprivation. The scandal in this latter case arises out of the conviction not out of the charge; the law considers every party charged to be innocent until he be proved guilty, and the only legal proof of guilt is a conviction by oral evidence in a temporal Court. *Nash v. Nash* (a), *Searle's case* (b), *Bromley v. Bromley* (c), *Slader v. Smallbrooke* (d), *Carr v. Marsh* (e), *Pawlett v. Head* (f), *Townshend v. Thorpe* (g), *Mogg v. Mogg* (h), *Price v. Clark* (i), *Galizard v. Rigault* (k).

Haggard and *R. Phillimore*, in support of the articles. All ecclesiastical jurisdiction may be comprised under three heads: 1st, *ratione privilegii*,

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BURDER
against

(a) 1 Cons. 140.

(b) Hobart, 121; 1 Cons. 141, n.

(c) 1 Cons. 141, n.

(d) 1 Lev. 138; 1. Sid. 217.

(e) 5 Ad. & Ell. 602.

(f) 2 R. t. Lee, 565.

(g) 2 Ld. Raym. 1507.

(h) 2 Add. 292.

(i) 3 Hagg. 271.

(k) 2 Salk. 552.

blished the jurisdiction of the Ecclesiastical Courts to proceed, in a case of this nature, for the purposes of deprivation or suspension from clerical functions or offices. The proceedings are not for punishment, but are brought *diverso intuitu et diversis rationibus*.

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against

Addams, in reply.—The case in *Levinz's Reports* was a proceeding as to which the Ecclesiastical Courts had undoubted jurisdiction; the question of forgery was incidental to the inquiry; therefore, a prohibition was well denied; it might with equal reason be contended that the Ecclesiastical Court could not take cognizance of a question of granting probate, because a will is opposed on the ground of forgery.

The Court has no jurisdiction in this matter, *Price v. Clark. (a)*

SIR H. JENNER FUST.

This is a cause of office, and is a proceeding under the act of her present Majesty, generally known as the Church Discipline Act, [3 & 4 Vict. c. 86,] and it is brought into this Court by letters of request from the Bishop of —.

By the decree, which has issued in pursuance, and on acceptance of these letters, the reverend gentleman therein named is called on to answer to certain articles, heads, positions, or interrogatories, touching or concerning his deprivation or suspension from his ecclesiastical offices and preferment. The purport of the proceeding it is unnecessary to state in detail, the object sought is not *pro salute animæ*, or *pro reformatione morum*, but the Court is asked

(a) 3 Hagg. 270.

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1844. to pronounce a sentence of suspension or deprivation of his clerical functions as against this gentleman.

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against

The Articles in this case were given in, and stood for admission; the party cited then undertook to shew cause, why he should not be suspended or deprived from the exercise of his ecclesiastical offices and preferments, and so the matter came before this Court. The Articles are eighteen in number; in the first place, they set forth, that, by the general laws ecclesiastical, all clerks and ministers in Holy Orders are enjoined to abstain from all immorality, obscenity, and indecency whatever. The second Article pleads, that the party cited is a priest or minister in Holy Orders; and was, in the year, &c., duly elected one of the perpetual priests, vicar's choral, or minor canons of the said cathedral church. The third Article exhibits the proper instruments of appointment to these offices. The fourth Article pleads, that this same party was in the year —, licensed by the Bishop of —, to perform the office of lecturer in the parish church of, &c.; that he entered upon the duties of such lectureship, and has ever since continued to act, and now acts as lecturer to the said church. The fifth Article exhibits the episcopal license. The sixth pleads, that the party was, on, &c., duly admitted and instituted to the vicarage of —. The seventh exhibits the usual document in supply of proof. The eighth, that the party was, on, &c., duly appointed chaplain to the county jail. The remaining Articles set forth the charges brought against this gentleman, and detail the facts and particular circumstances, which are, when proved, to subject him to deprivation or suspension.

These Articles are objected to : and the principal ground of objection is, that they contain charges for which the party is liable to be proceeded against by common law, and, if proved guilty, to be convicted and punished in the temporal or criminal Courts of this country ; and, therefore, it is argued, the party is not liable to be proceeded against for such offence in this Court; the Ecclesiastical Courts having no jurisdiction in such matters.

In support of this objection, the Court has been referred to several cases, recording instances, where it has been held, that this Court is not at liberty to proceed, for the punishment of offenders, for charges for which they are liable to be proceeded against and convicted in criminal Courts ; several of these instances being cases against clergymen, or persons holding spiritual or ecclesiastical offices. As a general proposition, this doctrine must be acceded to ; the question is, whether, for the purpose for which this suit is brought, this Court has not jurisdiction where the party proceeded against is a clergyman ? As against laymen, whatever may be the nature of the charge, undoubtedly the Court has no jurisdiction to entertain a criminal suit ; but it is by no means so clear, that, for the purpose of suspension from clerical offices, the Court cannot proceed against a clergyman. The distinction arises from the different object of the proceedings against a layman and a clergyman ; and, admitting the general rule, that the Ecclesiastical Court cannot proceed against either a layman or a clerk in orders for the purpose of punishment, the question is, whether, as against the latter person, it may not proceed to try the charge for the purpose of sus-

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against

1844. pending or depriving the offender from clerical
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against

Now, as I have before said, several cases have been adverted to in support of this objection, and, among them, that which is usually denominated *Searle's case*, which will be found in the note appended to the judgment in the case of *Nash v. Nash* (a).

The case of *Nash v. Nash* was a proceeding by a husband against his wife in a cause of divorce by reason of adultery. The libel charged the woman with cohabiting in an adulterous intercourse ; and it also pleaded a marriage with the adulterer, and exhibited in proof a copy of the entry in the church register of such marriage. It was objected that this marriage, being bigamy, was a felonious act, and could not be pleaded in the Ecclesiastical Courts. Lord *Stowell* said,—“ Certainly this Court cannot inquire into a felony *directly*, even where a clergyman is sued *for the purpose of deprivation*.” Now any opinion coming from Lord *Stowell* is to be attended to with the greatest deference, but the present case was not before him ; the immediate question was not, whether a suit for deprivation could be maintained against a clergyman ; but that point was put by him simply by way of trying the argument in favour of the admission of a plea, setting forth a second marriage, which was clearly a felonious act. *Searle's case*, in the note, which occurred in the 12th year of the reign of James 1, was as follows—“ Searle had been tried at common law and found guilty of manslaughter, whereupon he was questioned to deprivation before Dr. Bird,

(a) 1 Cons. 140.

Judge of the Court of Audience ; he desired to be admitted to his defence, that he was not guilty, contrary to the verdict."—this is from *Hobart* (p. 121) who says,—Dr. Bird came to me for direction, and we agreed, "that felony or other capital crimes were not examinable in the Ecclesiastical Courts ; no, not for purposes that were examinable there, as in this case of deprivation ; and therefore they may not originally examine such a crime to prove a *man* criminous, much less, when he is so proved in the proper Court, impeach the sentence."—Clearly these Courts cannot, but this does not appear to me to have been a decision upon the present point ; Dr. Bird and Chief Justice Hobart seem to have consulted together, and to have come to the conclusion that the Ecclesiastical Court would not examine into a capital crime, even for the purpose of deprivation ; but that, if the party had been convicted in the proper Court, they might build a sentence of deprivation upon the conviction ; therefore they thought, that *Searle* could not be allowed to give evidence, to shew that the verdict had been improperly obtained. *Bromley v. Bromley* was also cited ; that was a proceeding for divorce by reason of improper practices in the husband, in that case there had been a verdict at law, and the conviction was pleaded and admitted. So also in *Mogg v. Mogg* (a) there had been a conviction, and it was pleaded.

I have always understood it to be a settled point that no proceedings in this Court can be taken for the purpose of *punishing* a party for an offence, such as that imputed to the party here cited ; or such as

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(a) 2 Add. 292.

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felony, or a crime triable at common law. A distinction, and an important distinction, was taken in the case of *Burgoyne v. Free*, although, perhaps, that case is not quite strictly applicable to the present question, namely, whether proceedings can be taken against a clergyman by his bishop or ordinary, for the purpose of suspending or depriving him from his ecclesiastical offices; such a suit stands on a very different footing from a proceeding for the purpose of punishing the party; and the question is, whether, for the purpose of suspension and deprivation, this Court is not at liberty to entertain a suit of this description? If there had been a conviction at common law, and that conviction pleaded, this Court need not, indeed could not, enter into any inquiry, but would proceed upon the conviction; but, where there have been no proceedings at law, and none stated to be in progress, the question is, is not the case within the principle of *Burgoyne v. Free*, and is not the bishop at liberty to proceed for the purpose of suspension or deprivation? That was a case of proceeding against a clergyman, a beneficed clergyman, and no doubt the Ecclesiastical Court had cognizance of the particular crime charged against the party; the only question was, whether the statute 27 Geo. 3, c. 44, did apply to a proceeding by a bishop against a clergyman of his diocese; the statute having introduced a limitation of time within which such a suit must be brought. The title of the act is, "An Act to prevent frivolous and vexatious suits in Ecclesiastical Courts," and it enacts, "That no suit shall be commenced, in any Ecclesiastical Court, for incontinence, after the expiration of eight calendar

months from the time when such offence shall have been committed; nor shall any prosecution be commenced or carried on for fornication, at any time after the parties offending shall have lawfully intermarried." Lord Chief Justice Tenterden, at that time Chief Justice Abbott, stated the case thus [5 *B. & Cres.* 404]. "It has been contended before us, that this statute extends to the clergy as well as the laity, and we think it does, as far as they and laymen are on the same footing; that is, where the object of the suit is reformation of manners or the soul's health; but that it was not intended to limit the time for proceeding against a clerk *as such* for deprivation." Here, then, is a distinction drawn in this particular case between a suit for deprivation and a suit for punishment: he proceeds, "Such a suit is not frivolous or vexatious; it is not within the mischief or object of the statute. Reformation of manners is not the object, or at all events not the only object of this suit. The Articles shew that one at least of the objects of the suit was to procure the deprivation or suspension of the plaintiff, a species of jurisdiction which the Ecclesiastical Court has no opportunity of exercising over laymen. Now, in other temporal matters, such as forgery of orders, there cannot be any proceeding against a layman as such; but if he has obtained a benefice, he may be sued in the Ecclesiastical Court in order to his deprivation, according to *Slader v. Smallbrooke* (1 *Lev.* 138; 1 *Sid.* 217). We think, therefore, that as to the charge of incontinence, the Ecclesiastical Court may proceed for the purpose of deprivation, and our judgment will be, that the prohibition stand as to proceeding upon the charge of forni-

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Articles, I think it was perfectly competent to the spiritual Court to proceed in the ordinary way, both *pro salute animæ*, and for deprivation. In the spiritual Court, it was contended for Doctor Free, that the statute 27 Geo. 3 was a bar to the proceeding, but the objection was overruled, and then he applied to the Court of King's Bench for a writ of prohibition, and was ordered by that Court to declare in prohibition. The Court of King's Bench was of opinion, that the proceeding, so far as it was *pro salute animæ*, and reformation of manners, was barred by the act, even in the case of a clergyman, after the expiration of the eight months. But a much more important question arose, and that was, whether the statute applied to a proceeding in the spiritual Court for the purpose of deprivation; and, looking at the title, the preamble, and the provisions and enactments of the statute, I concur with the Judge of the Court of King's Bench, that the limitation of eight months does not apply to the proceeding in the Ecclesiastical Court for the purpose of deprivation."—In that case, therefore, both Chief Justice Abbott and Lord Lyndhurst thought, that the ecclesiastical tribunals could not inquire into the case, for the purpose of punishing the party, but might do so with a view to his deprivation,—Lord Lyndhurst proceeds, after stating the effect of the judgment of the Court of King's Bench, "I think the Court was warranted in this judgment both on principle and authority. The case of *Slader v. Smallbrooke* was one in which proceedings were instituted against a clergyman who had forged his orders; and on application for a prohibition, the Court of King's Bench held, that

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py of the proceedings in that case, nor have I
 en able to obtain them ; the bishop certainly was
 tlawed, but still, it was held, that as bishop he
 is liable to be proceeded against and deprived of
 s see for the offence imputed to him ; the out-
 wry might have been equivalent to a conviction,
 d so far this would be a different case. Reference
 is also made to another case ; it was not des-
 igned by any title, but as a case before the
 Judicial Committee, on an appeal from the Island
 of Jersey (a). A writ, in the nature of a Writ of
 prohibition, issued from the Royal Court in that
 island, to the Ecclesiastical Court, whereby that
 Court annulled certain proceedings in the
 Ecclesiastical Court, and ordered, that all the acts
 which referred thereto should be erased from the
 records of the Court. From this last sentence there
 was an appeal to Her Majesty in Council ; and I
 may here say, that the Royal Court in Jersey cor-
 responds, to some extent, with the Court of Queen's
 Bench in this country.—The Judicial Committee
 came to the opinion, that the writ had issued
 wrongfully, and they reversed it ; in the result it
 was held, that the Ecclesiastical Court in Jersey
 was at liberty to institute that particular proceed-
 ing. When that case was before the Judicial
 Committee, I sat as one of the Judges, and I
 pronounced the judgment of their Lordships ; the
 case turned on the construction of the canons by
 which the ecclesiastical law in the island of Jersey
 governed, and on one canon in particular, the

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 against

(a) Since reported, nom. *The Dean of Jersey v. The Rector of*
 ———, 3 Moore, P. C. C. 299.

of ———; accusing him of leading a most scandalous life, and of having committed indecent as well as criminal acts; to the great scandal of religion, and especially of the Established Church of which he is a minister.”

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That case does seem to me to go the length of declaring, that the Ecclesiastical Court has jurisdiction over clerks in Holy Orders, for the purpose of deprivation and suspension; although, to a certain extent, that may be punishment; but still punishment is not the object of the proceeding; the object is to remove the party from the office in relation to which he has so misconducted himself. I am of course now considering that the facts charged in these Articles may be established in proof; and the Court does not mean to go in detail through these Articles; I do not understand them to charge an actual offence, but a series of acts obscene and indecent in themselves. This person was the chaplain of a jail, and in the course of that duty a person was committed to his care and superintendence; and the charge is that of vicious propensities existing, and to be proved by overt acts. In the case from Jersey it was argued, that as the offence was laid, evidence of actual guilt might be given; but that objection was disallowed, and it was said, it was a proceeding to remove a scandal, and that the possibility of such evidence being given, was no ground for issuing the prohibition. Surely! No clergyman can be suffered to remain in the cure or possession of an ecclesiastical benefice whilst labouring under such an imputation as these Articles charge; it may be mere report, but still it is a scandalous report, and it arises out of con-

Reverend person appears, in addition to his other preferment, to hold the office of chaplain of a jail, and it is against him in the discharge of his duties of that office that this offence is imputed. The Article is the seventeenth, and it refers to inquiries made privately by the visiting justices of the jail; and the conclusion to which they came, namely, that the party should be suspended from his office, whereupon he resigned his appointment; and the Article has annexed a paper purporting to be a true copy of the minutes of the resolution of the visiting justices, as entered upon the journals of the jail. I cannot see how this can be made evidence in any way; I cannot see how, because these justices take upon themselves to inquire into a certain report, and upon the evidence they receive in the course of that investigation, feel bound to exercise the discretionary power reposed in them, and to suspend this party from his office of chaplain, that can be evidence against the party in this cause. With respect to the evidence to be adduced, this is not the time to enter upon a discussion of, or to give any opinion upon that point; the parties by whom these charges are to be proved, may, as has been said, be persons whose testimony will not be entitled to receive any credit; it may prove so, but the Court cannot determine, *à priori*, whether they are or not competent to give evidence; or whether their testimony will or will not be sufficient.

Therefore, at the present moment, I content myself with rejecting the seventeenth Article; admitting the rest of the Articles to proof; and reserving all questions until hearing of the cause.

[A rule *nisi* for a prohibition has been granted in this case.]

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accordingly overruled it; a prohibition was then applied for and refused, upon which an absolute appearance was given for the party cited; a libel, setting forth the charge against the party cited, was brought in and admitted; a negative issue was given to the Articles; witnesses were examined, and publication prayed; and this allegation is now offered by way of defence to the charge brought against this Reverend gentleman.

The substance of the defence is, that this child was unbaptized within the true meaning of that term, as used in the Rubric for the burial service, it being alleged in the Articles, and not denied, that the child was baptized by a minister of that class of Protestant Dissenters termed Independents, according to the form used by them, that is, with water, in the name of the Father, the Son, and the Holy Ghost; and it is pleaded, on behalf of the Rev. Mr. Chapman, that such baptism is schismatical and heretical, and such as not to entitle the corpse of this child to have the burial service read over it.

I had hoped, that after the late case of *Mastin v. Escott* (a), after the sentence in this Court, and the affirmance of that sentence in the superior Court, this question was set at rest, and that no further resistance would have been offered to what was declared, both by this Court and by the Court above, to be the law on this question. This Court is bound, upon proper application made, to enforce the law; this Court has no discretion whether or not it will entertain a suit of this description, which

(a) 2 Curt. 692, affirmed by the Judicial Committee, 2nd July, 1842.

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yet been distinctly raised, and Courts of law never determine more than the question raised before them; yet undoubtedly the greater part of the argument in *Mastin v. Escott* turned on the question, whether schismatical or heretical baptism was or was not valid; it was part of the object, of the party there cited, to shew that the baptism in that case was heretical and schismatical, and not simply lay baptism, and the arguments were founded principally on its being heretical and schismatical; and, although, as I have said, it was not necessary in that case to decide, whether schismatical and heretical baptism was valid, or invalid, the arguments were principally directed to that point. It is not, however, necessary to enter into the arguments which were so elaborately urged on the Court in that case; I have stated that they principally turned on this point; reference was made to the different opinions entertained in the Primitive Church as to the validity of such baptism: the authority of *Tertullian* was cited in support of that baptism, and the opinions of *St. Cyprian*, *Firmitian*, and writers in the second and third centuries in opposition to it. Again, reference was made to the *Council of Arles*, to the opinion of *St. Austin*, and to the general opinion in favour of that proposition; also to the opinions of the Eastern and Western churches, and to the practice down to the time of the reformation, and thence to the present time.

The strength of the arguments certainly turned on the point, whether schismatical or heretical baptism was or was not valid. It does appear to me, therefore, that this present question is reduced to a narrow compass, and I say so at the present

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remained long undetermined, that has arisen from inevitable circumstances (a), and not from any doubt which the Court has entertained with respect to the law of this case; and it being not now questioned, that baptism, by heretics or laymen, is a valid baptism, and need not to be reiterated (indeed one of the authorities, cited by the learned counsel who support this allegation, went to shew that such baptism need not be repeated); and this surely was acknowledging it to be valid in itself; and if so, even although received at the hands of persons who disbelieve in the doctrine of the Trinity, the recipient cannot be said to die *unbaptized*.

There cannot then be any doubt in the mind of the Court as to what must be the fate of this case, when, as I have shewn, the baptism itself is admitted to be valid; and the only doubt I feel, is, whether this allegation ought not to be admitted for the purpose of allowing the question to go up to the Privy Council, in order to be discussed before the highest tribunal. This Court would be very much inclined to pursue the course which it adopted in the case of *Martin v. Escott*, namely, to admit the allegation, for the purpose of enabling the parties, if so inclined, to take the opinion of the superior Court. But if the parties wish to take a higher opinion upon the admissibility of this allegation, they can apply for leave to appeal from its rejection; for, that it must be rejected, is the opinion to which the Court has arrived. The Court would be unwilling to exercise the discretion reposed in it by the Act of the 3 & 4 Vict. (c. 86, s. 13,) by refusing

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CHAPMAN.

(a) The indisposition of the Judge.

both cases the child would seem to be, in the words of the Rubric, *sufficiently* baptized,—and I use the word “*sufficiently*” advisedly, and in the sense in which it is used in the Rubric. It was not a word for the first time introduced in the former case by this Court, the word will be found in the first Rubric (*a*), and the word has been continued and used in the Rubric for the present form of baptism. In both instances, it is declared that a child so baptized (in the case of a layman it has been already decided, and, as I consider, by a heretic also) is sufficiently baptized, according to the use made of that word in the Rubric, to which meaning the Court is confined in this case.

To what extent such baptism goes is not for this Court to determine; whether it does or does not confer spiritual grace, the Court does not offer any opinion upon; all which the Court declares, is, that the child was not *unbaptized*, need not be baptized again, and, if not unbaptized, that the minister was not justified in refusing to read the burial service over it. It has been contended, that there are other means besides baptism by which this child must be qualified to be admitted into the body of the Church, and admitted to partake of the privileges of the Church. What these other means are, I have not yet heard; I suppose the imposition of hands by the Bishop at confirmation. I inquired during the argument, and I could not find that there were any means by which this child could be admitted into the Church of England except by confirmation by the Bishop after it had arrived at years of discretion; and I now assume that this

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CHAPMAN.(*a*) Edward VI., A.D. 1549.

Therefore, it does appear to me, upon these grounds, unless there be something in the allegation which can be said to constitute a valid defence for refusing to bury this child ; I mean refusing the offices of the Church, and the benefits conferred by the offices of the Church, whatever they be, that this question has been determined by what took place in *Mastin v. Escott*, and by the admission of the principle, that this is so far a valid baptism that it need not be repeated. It is quite impossible that this child, by sins of commission or omission, can have forfeited the right to these offices, for the child died shortly after its birth ; at least, so far as this child is concerned, it could not be by any fault of its own that it did not obtain the ulterior rite of imposition of hands, for that can only be obtained by an adult having knowledge of the Creed, the Ten Commandments, and the Church Catechism. The question, as it appears to me, is not whether this child was admitted into the Church of England, but whether it was admitted into the Church of Christ ?—" God forbid," said Dr. *Phillimore*, in arguing this case, " that I should say this child was not a Christian," having received the rite of baptism.

Unless, therefore, there be something in the Articles of this allegation which can in form or substance constitute a defence to this charge, or prevent the party being condemned in costs, the Court will reject the allegation.

Now the *first* Article of this allegation recites the *fourth* Article of the libel given in by the promoter of this suit, pleading the law with respect to the office of burial, and setting out the sixty-eighth

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tion is to shew, that the party did not refuse to bury the corpse, but to bury it according to the rites and ceremonies of the Church of England, which he is ordered to do by the Canon law, and for refusing to do which he is punishable, unless the corpse be that of a party unbaptized, or excommunicate *majori excommunicatione*. This appears to me to be altogether immaterial, his duty is to be an active duty, he is not simply to allow the body to be buried, but he is to bury it according to the rites and ceremonies of the Church of England. Then it goes on to plead, "that by such refusal the party cited did not act in contempt of the laws, Canons, and constitutions ecclesiastical, but on the contrary he acted in conformity therewith, as well as in obedience to and in conformity with the obligations by which he bound himself when he became an ordained minister of the Church of England." This is the whole question in the suit! Was it or was it not his duty? Surely it is not necessary to plead this. I remember it was so pleaded in *Mastin v. Escott*, and the Court then pronounced it to be unnecessary and inadmissible, and only allowed it to be retained in order that the whole question might go up to the Appeal Court, as being then a new question, notwithstanding the decision of Sir *J. Nicholl*, in *Kemp v. Wickes*. I may here observe, what I intended to have before observed, that, in the *first* Article of the allegation, it is pleaded, "that the rights and privileges conferred by the 68th Canon were confined to members of the Church of England." I do not understand what are the rights and privileges which were conferred by this Canon; the

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the time of his refusal to bury the said corpse, well and sufficiently apprized and aware of the fact of such baptism, and he made or assigned the aforesaid fact of such baptism expressly as the pretext or ground of refusing to comply with such entreaties and application.”—this is the charge ; what is the answer ? “ That the aforesaid baptism of the said infant, as set forth in the said *sixth* Article, by the said C. Moase was heretical :” here the Article stops. The Court must look to the other Articles, to see whether this baptism was a valid baptism, or whether the party was excluded from the rites of the Church of England.

The *fourth* Article pleads, “ That by the ecclesiastical laws of the whole Catholic Church, more especially as they are expounded and laid down in the Canons and decrees of the two first general councils, which Canons and decrees have been adopted by the Church of England, and on diverse occasions recognised to be of binding authority by the statutes of the realm applicable to questions of heresy and schism, more especially by statutes 1 Eliz. c. 1, s. 36 ; 29 Car. 2, c. 9, s. 2, the said C. Moase having collected a congregation in opposition to the canonical bishop, is guilty of heresy, and any baptism performed by him is heretical.”

A former Article had alleged that the baptism, set forth in the *sixth* of the promoter’s Articles, was heretical, here it is pleaded, that the person who performed the service of baptism had collected a congregation in opposition to the bishop, and was therefore at the time a heretic, and, it is to be inferred accordingly, at least so I suppose, that any baptism performed by him is heretical.

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of the Judge is not a party who can be permitted to accuse the party cited.

The *sixth* Article pleads, "That by the twenty-first Canon of the fourth general council holden at Chalcedon in the year of our Lord 451, it was decreed and ordained—*Clericos vel laicos episcopos aut clericos accusantes non indiscriminatim, nec citra inquisitionem admittere ad accusationem, nisi eorum existimatio prius examinata fuerit.* This merely goes to the same point, that the party promoting the office is not legally competent to do so as against a clergyman.

The *seventh* Article I have already referred to (*a*), it contains the sum and substance of the charge that the baptism of this infant was heretical.

This, as I have already stated, is the whole question before the Court, is this a valid or an invalid baptism? It is not averred, nor is it even attempted to be said, that this is an invalid baptism, null, void, and of no effect whatever; all that is pleaded is, that the recipient thereof is not entitled to partake of the privileges of the Church until he or she has complied with certain forms. What is the particular form, as I before observed, is not stated; it was only during the argument that I collected, it is to be by the bishop by the imposition of hands; and therefore the form which is to entitle the recipients of this heretical baptism to be admitted into the Church, is precisely the same as is requisite to entitle the recipients of the most regular baptism to that privilege.

Now, I think, in rejecting this Article, I am

(*a*) *Ante*, p. 844.

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who, by open denunciation of the Church, was rightly cut off from the unity of the Church, and to be considered as a publican or an heathen. *Primá facie*, this can hardly be said to apply to this child, dying in its infancy, before it could have committed any heresy.

The next, the *eleventh* Article, is one of a most extraordinary description. It sets forth the 3rd, 4th, 5th, 6th, 7th, 9th, and 12th Canons of 1603 (*a*).

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(a) 3. *The Church of England, a true and Apostolical Church.*

Whosoever shall hereafter affirm, That the Church of England, by law established under the King's Majesty, is not a true and Apostolical Church, teaching and maintaining the doctrine of the Apostles; let him be excommunicated *ipso facto*, and not restored, but only by the Archbishop, after his repentance and public revocation of this his wicked error.

4. *Impugners of the Public Worship of God, established in the Church of England, censured.*

Whosoever shall hereafter affirm, That the form of God's worship in the Church of England, established by law, and contained in the Book of Common Prayer and Administration of Sacraments, is a corrupt, superstitious, or unlawful worship of God, or containeth any thing in it that is repugnant to the Scriptures; let him be excommunicated *ipso facto*, and not restored, but by the Bishop of the place, or Archbishop, after his repentance and public revocation of such his wicked errors.

5. *Impugners of the Articles of Religion, established in the Church of England, censured.*

Whosoever shall hereafter affirm, That any of the nine and thirty Articles agreed upon by the Archbishops and Bishops of both provinces, and the whole Clergy, in the Convocation holden at London, in the year of our Lord God one thousand five hundred and sixty-two, for avoiding diversities of opinion, and for the establishing of consent touching true Religion, are in any part superstitious or erroneous, or such as he may not with a good conscience subscribe unto; let him be excommunicated *ipso facto*, and not restored, but only by the Archbishop, after his repentance, and public revocation of such his wicked errors.

6. *Impugners of the Rites and Ceremonies, established in the Church of England, censured.*

Whosoever shall hereafter affirm, That the Rites and Ceremonies

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These Canons are pleaded to shew, that persons guilty of the offences there mentioned, are excommunicate *ipso facto*; the substance of these Canons is pleaded in the *twelfth* Article; "That the said J. Rumbold, C. Moase, and T. Titchmarsh, the promoter of this suit, are persons who have severally affirmed, and do severally affirm;" then it ascribes to each of these persons offences against the seven

of the Church of England by law established are wicked, antichristian, or superstitious, or such as, being commanded by lawful authority, men, who are zealously and godly affected, may not with any good conscience approve them, use them, or as occasion requireth, subscribe unto them; let him be excommunicated *ipso facto*, and not restored until he repent, and publicly revoke such his wicked errors.

7. *Impugners of the Government of the Church of England by Archbishops, Bishops, &c., censured.*

Whosoever hereafter shall affirm, That the government of the Church of England under his Majesty by Archbishops, Bishops, Deans, Archdeacons, and the rest that bear office in the same, is antichristian, and repugnant to the word of God; let him be excommunicated *ipso facto*, and so continue until he repent, and publicly revoke such his wicked errors.

9. *Authors of Schism in the Church of England censured.*

Whosoever shall hereafter separate themselves from the Communion of Saints, as it is approved by the Apostles' Rules, in the Church of England, and combine themselves together in a new brotherhood, accounting the Christians, who are conformable to the doctrine, government, rites and ceremonies of the Church of England, to be profane, and unmeet for them to join with in Christian profession; let them be excommunicated *ipso facto*, and not restored but by the Archbishop, after their repentance, and public revocation of such their wicked errors.

12. *Maintainers of Constitutions made in Conventicles censured.*

Whosoever shall hereafter affirm, That it is lawful for any sort of Ministers and Lay-persons or of either of them, to join together, and make rules, orders, or constitutions, in Causes Ecclesiastical, without the King's authority, and shall submit themselves to be ruled and governed by them; let them be excommunicated *ipso facto*, and not be restored until they repent, and publicly revoke those their wicked and Anabaptistical errors.

Canons pleaded in the *eleventh* Article, and concludes by pleading, "That they were and are severally persons rightly cut off from the unity of the church, and excommunicated according to the true intent and meaning of the 33rd of the *thirty-nine* Articles pleaded and referred to in the *tenth* Article of the allegation. I confess that when I read these two Articles, the question did occur to me, "how, by what means, and in what manner, are all these things to be proved? Here are three persons alleged to have offended against no less than seven distinct Canons, or some, or one of them, or some parts or part thereof," upon which witnesses are to be examined, to prove such and such things there stated, by which it is to be shewn, that these parties have incurred the penalty of excommunication. Who are to be the witnesses, what number of witnesses are to be examined on such a charge? The parties themselves cannot be compelled to answer to such charges, because if the charge be valid any answers to such charge might be made use of against them as a confession in a cause of heresy. No person is bound to answer criminatory charges; no witness is bound to answer questions which may criminate, or tend to criminate him. Then Mr. Chapman must bring satisfactory legal proof of these charges, not mere confession, but legal proof by witnesses.

The great question argued is, that thrown out in the superior Court, namely, whether excommunication *ipso facto* is or is not incurred without a declaratory sentence; upon that point the learned lord who delivered the judgment of the Judicial Committee in the case of *Mastin v. Escott*, ex-

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It is impossible to read the act, 53 Geo. 3, c. 127, and not perceive, that all incapacity arising from excommunication is removed. The 2nd section does indeed provide, “That nothing in this act shall prevent any Ecclesiastical Court from pronouncing or declaring persons to be excommunicated in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences.”—It has been said, that this reserves to

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communicate *ipso facto*, for having been present at a clandestine marriage, it has been held in *Scrimshire v. Scrimshire* (a), that if produced as a witness in a suit he must be first absolved, not generally absolved, but merely for the purpose of giving evidence, and that, after giving evidence, he falls back to his status before absolution; and that the effect of such *ipso facto* excommunication must be taken notice of in an Ecclesiastical Court; indeed, it was taken notice of in that very case. I asked counsel whether there was any instance of a party, merely accused, being excommunicate *ipso facto*, except in the case of being present at a clandestine marriage; no other case has been pointed out.

It is impossible to consult the authorities, and not see that *sententia declaratoria* is requisite; that there is no case in which excommunication can be incurred without a declaratory sentence. To turn to *Lyndwood*, in every passage, in which *excommunicatio ipso facto*, is said to be incurred, the expression used is *sententia declaratoria*, lib. 1, tit. 2, pp. 11 to 15, at page 13, (B). "*Et sic hæc est pœna sententiæ latæ, quam incurrit inobediens ipso jure. Executio tamen hujus pœnæ fieri non debet, nisi prius per ipsum, ad quem pertinet sententia declaratoria, super hoc fuerit promulgata.*" Page, 15, (P), the gloss on the words *excommunicatio ipso facto*. "*Et sic est constitutio latæ sententiæ. Requiritur tamen sententia declaratoria.*"

It is useless to quote passages in which it is laid down that a declaratory sentence is necessary, before a party can be visited with the consequences of excommunication; he must be pronounced guilty

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(a) 2 Cons. 399.

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The *fourteenth* Article pleads the 20th section of the Church Discipline Act, (3 & 4 Vict. c. 86,) limiting the time of proceeding in this Court to two years from the time of committing the offence; this question was before the Court on protest (*a*); and the Court then decided the point, holding that the offence was a continuing offence; and that the second application and refusal to bury, being within the two years, the case came within the statute.

The *fifteenth* Article pleads the 3rd section of the same act; which empowers the bishop of the diocese, if he shall think fit, to issue a commission directed to certain persons, to inquire into the grounds of any charge or complaint against any clerk in Holy Orders, charged with any offence

(a) *Ante*, p. 703.

26th day of May, 1841, the said corpse was never on any occasion brought to the church-yard of the parish, nor was, during such period, any warning given to Mr. Chapman, according to the 68th Canon ! Now in the citation, and in the Articles of the libel, two distinct applications are stated to have been made, the one in the year 1840, the other in 1841, if these are not proved the party cited will have all the benefit he can possibly have by admitting this Article.

These are all the Articles given in in the first instance ; certain additional Articles have since been brought in, in supply of proof of the matters contained in the *twelfth* former Article, pleading a certain document purporting to be written by Mr. Moase, the minister of the dissenting chapel in this parish. No doubt this document is most intemperate and improper, shewing a most indecent and intolerant spirit against the Established Church ; but the fact of Mr. Moase having written this letter cannot have the effect of preventing another person, an infant of a few days old, having the benefit of the offices of the Established Church. No doubt the most bitter spirit of intolerance against the Established Church is evinced in this letter, which is a printed letter, probably meant for circulation, but still this cannot be permitted to have any effect in this cause.

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11. A citation in a cause of office, must describe sufficiently the offence charged against the party, so as to shew that it is a matter of Ecclesiastical cognizance, but it need not minutely specify all the particulars of the offence, which are to be charged in the articles. 209

12. An interested witness who had been examined and repeated, ordered to be re-examined on motion *before* publication. 337

13. A citation “to appear and answer in a cause of nullity of marriage.” *Held*, a sufficient description of the nature of the suit. Protest to appearing there-to, overruled. 338

14. The executor of a deceased parishioner cannot be cited in an Ecclesiastical Court, in respect of a Church-rate due from his testator.

An Appeal Court in order to prevent a failure of justice, may

correct the irregular procedure of an inferior Court; (*e. g.*) by permitting an examination of witnesses, or receiving additional articles in supply of requisite averments omitted in a libel given in an inferior Court. 343

15. Practice on appeals. The libel of appeal ought to agree with the inhibition. 715

16. The term probatory, assigned on a third plea, opens the term probatory on the previous pleas in the cause. The extension of a term probatory, being in the discretion of the Court, granted on equitable conditions. 721

17. A citation issued from the Diocesan Court, addressed to a party then residing and being within the diocese. The party quitted England before service was effected. The citation was personally served on him in parts abroad. Protest to appearing overruled.

A proctor taking out a citation for a party, had not a formal proxy from his client at the time it issued. Protest to appearing overruled. 726

18. In every case where the consent of parties is required, proxies of consent must be actually in the registry before the Court is moved to make any decree in such case. 750

19. Next of kin are not barred by mere lapse of time, by acquiescence or by the receipt of legacies, from requiring executors to prove a will in solemn form. But, where a will had been declared well proved in the Court of Chancery, after an order for an issue *dev. vel non*, had been

discharged on the petition of the heiress-at-law (also sole next of kin) and her husband, and an annuity bequeathed to her regularly received during fourteen years, the Prerogative Court refused, at the prayer of the heiress-at-law and her husband, to enforce a decree calling on the executors to prove that will in solemn form. 802

20. Excommunication *ipso facto* must be preceded by a declaratory sentence of a competent Court. 840

PROBATE,

See WILL.

PRACTICE, 3.

ADMINISTRATION, 4.

PROTEST,

See PRACTICE, 1.

DOMICILE, 2.

PROXY,

See PRACTICE, 5, 17, 18.

SENTENCE,

See JUDGMENT.

1. Excommunication *ipso facto* must be preceded by a declaratory sentence of a competent Court. 840

SOLDIER,

See WILL, 22, 43.

STATUTES,

3 and 4 VICT. c. 86—32, 703.

CHURCH BUILDING ACTS, 352.

WILLS' ACT, See WILL.

VESTRY.

1. Notice of a Vestry meeting, for making a Church-rate may be given by a private parishioner. 680

WILL.

1. Testator signed his name at the bottom of a printed form, ending on the second side of a sheet of paper, the will itself ending on the first side. Probate allowed to pass of the will as signed at "the foot or end thereof." 29
2. An affidavit as to the due execution of a will being required from the attesting witnesses; one of the witnesses deposed that the will was signed in the presence of himself and the other witness, the other witness having no recollection as to the fact. Probate allowed. 54
3. Probate granted of two instruments, as together containing the will of the deceased, the latter paper being duly executed, and referring to the former, (not in the possession of the deceased at the time,) so particularly, that there could be no mistake as to its identity. 57
4. Reference being made in a will to a deed, so as to make it part of the will of the testator; probate allowed of the will, and a notarial copy of the deed, under the circumstances. 60
5. To establish the will of a party totally blind, or so nearly so as to be incapable of discerning writing, it must be proved, that the will was read over to the deceased in the presence of witnesses, or, that he was otherwise acquainted with the contents. 63
6. A testator appointed the Archbishop of Tuam for the time being an executor of his will; the Archiepiscopal jurisdiction of Tuam having been abolished.

- by Stat. 3 and 4 Will. 4, c. 37. Probate granted to the Bishop of Tuam as executor. 75
7. Probate granted of an unexecuted paper as part of the will of the testator, there being sufficient reference to the paper in the will to identify it as the paper referred to. 77
8. The deceased having signed his will, acknowledged the signature in the presence of one witness, who subscribed his name to the will, and on a subsequent day acknowledged the signature to another witness, who subscribed his name, the former witness being present at the time, but who did not again subscribe his name; motion for probate rejected. 79
9. A testator appointed an executor by the description of "Lord Sackville" and "Lord George Sackville." It appeared there were only two persons to whom the description could apply, viz.: "Charles Lord Sackville, Duke of Dorset," and "The Honble. George Germain." *Held*, under the circumstances that the former was the party intended. 86
10. Motion for probate of a will signed by the deceased *after* the witnesses had subscribed their names, the witnesses having, subsequently to the signing by the deceased, placed seals opposite to their names, rejected. 117
11. Motion for probate of a will signed by the deceased in the presence of two witnesses, but subscribed by them in an adjoining room, communicating with folding doors, but in such a situation that the deceased could not see them, rejected. 118
12. A testator executed his will, containing a legacy therein of *fifty* pounds to S. S. Subsequently to the execution, he erased the word *fifty*, and substituted the word *thirty*. The alteration not being attested, probate granted with the original word *fifty* inserted. 121
13. The evidence of one witness, although *omni exceptione major*, is not sufficient to support a testamentary paper purporting to be duly executed and attested, where there are no adminicular circumstances tending to confirm it, and where the probabilities of the case incline against the factum of such an instrument.
- A paper of a testamentary nature was produced by a sole legatee named in it; it purported to be signed by the testator and to be attested by two witnesses, one of whom had, subsequently to the date of the paper in question, married the legatee. The evidence of the other witness, whose credit and testimony were unimpeached, entirely supported the factum of the paper. *Held*, that his sole testimony could not sustain the paper, there being no circumstances leading up to the probability of the transaction, and there being, on the contrary, various facts and circumstances from which the Court drew a conclusion unfavourable to its legal validity. 125
14. A paper admitted to probate, on the testimony of one of the two attesting witnesses, although the other witness deposed, that it was not signed by the testator in his presence. The circum-

stances of the case inclining to favour the supposition of a due execution, *e. g.*, a formal attestation clause; and the first witness having, in an affidavit sworn a few days after the will was made, deposed to the due execution, the second witness not having been examined until two years and a half afterwards. 151

15. A. B. (deceased) requested two persons, present at the same time, "to sign a paper for him," which they did in his presence; the paper was so folded, that the witnesses did not see any writing whatever on it; A. B. did not state what was the nature of the paper in question. On the death of A. B., it was found to be his intended will. *Held*, that it was not entitled to probate, the provisions of the 9th section of the 1st Vict. c. 26, not having been complied with. 160
16. By the law of Turkey, no subject of that country can make a will. By treaty between Great Britain and the Ottoman Empire, an English subject domiciled in Turkey may make a will. J. M. was the son of an Englishman who had died domiciled at Smyrna. J. M. himself had never been in England, except for the space of six years, and then only for the purpose of education; he died at Smyrna, having made a will in the form of an English will, but not executed and attested according to the 1st Vict. c. 26. Probate of such paper was refused. 231
17. A testator signed a codicil in the presence of a witness (his sister) who, at his desire at-

tested, and subscribed it. On a subsequent day, when his sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying in the presence of both parties, and pointing to his signature, "This is a codicil signed by myself and my sister as you see; you will oblige me, if you will add your signature, two witnesses being necessary." That party then subscribed in the presence of the testator and of his sister, the latter who was standing by him, pointing to her signature, and saying, "There is my signature, you had better place your's underneath." She did not however re-subscribe. *Held*, that the instrument was not sufficiently subscribed, under 1st Vict. c. 26, s. 59. 243

18. A testatrix duly executed a will, and, subsequently thereto, two other wills, in both of which was contained a clause revoking all former wills. She afterwards destroyed the two latter wills. *Held*, that the first will was not thereby revived; and that parol evidence is not admissible to shew an intention to revive. 432
19. A testator produced a will, all in his own handwriting, and having his name signed at the end thereof, to three persons, and requested them, *to put their names underneath his*. *Held*, a sufficient acknowledgment of the signature, the Court being satisfied, (although there was no express evidence of the fact) that the signature was of the handwriting of the testator. 451

20. A will was written on three sides of a sheet of paper; on the fourth side was written a codicil. Both instruments were signed in the presence of, and attested by the same two witnesses, and at the same time; the witnesses were not informed of the fact that they were attesting two separate instruments. The codicil to a great extent annulled the will. *Held*, that this circumstance was not sufficient to discredit the will, it being proved to have been the voluntary act of a capable testatrix. 458

21. A will is not valid unless executed in conformity with the law prevailing in the country where the testator is domiciled; and the fact of the property (personal) bequeathed by such will, being locally situate in another country, and of the will being duly executed according to the law of that country will work no distinction.

A testator, by will duly executed in the year 1823, directed his executors to pay legacies which he should give by any testamentary writings signed by him, whether witnessed or not. *Held*, that such clause could not give effect to legacies bequeathed by an unattested paper made subsequently to the 1st Vict. c. 26.

A testator, previous to the 1st of January, 1838, had made a will and several codicils; some duly executed, others only signed by the testator. Subsequently to the 1st of January, 1838, he made and signed a codicil (B) but the same was not duly attested. Subsequently to this, by

a codicil (C) duly executed and attested, he ratified and confirmed his will and "*codicils*."

Held, that the codicil (B) was not so identified with (C) as to be ratified by, or incorporated with (C), the word "*codicils*" being more completely and properly applicable to the codicils made previously to the 1st of January, 1838.

The 1st Vict. c. 26, applies to wills made previous to the 1st of January, 1838, if any alteration is made therein after that time. 468

22. Construction of the 11th section of the 1st Vict. c. 26, which enacts "That any soldier being in *actual military service*, may dispose of his personal estate as he might have done, before the making of the act." 522

23. Positive affirmative evidence, by the subscribed witnesses, of the fact of signing or acknowledging the signature of a testator in their presence, is not absolutely essential to the validity of a will. The Court may presume due execution by a testator upon the circumstances. 547

24. A party shewed a paper to two persons present at the same time, and requested them to sign it; both persons observed the signature of the party affixed to the paper; and both subscribed it in her presence. This paper, being a will, held to have been duly executed.

Alterations on the face of a duly executed will, held, upon the circumstances, to have been made before execution. 607

25. A testamentary paper (dated 1826) signed by a testator, having an attestation clause, but not subscribed by witnesses. The presumption of law against the final character of the paper held to be rebutted, and probate granted upon the evidence and circumstances. 612
26. An inofficious will, prepared from instructions given to the drawer by the party almost solely benefitted, and who was in nowise related to the testator, pronounced valid, on proof of capacity of the testator, and of the will having been read over to him. 623
27. A will (dated February, 1837,) disposed of real and personal estate. A codicil (June, 1837,) partly revoked the disposition of the personalty. A memorandum (July, 1838,) formally republished the will. *Held*, that parol evidence was admissible to shew *quo animo* the memorandum was made; and, upon the evidence, that the codicil was not revoked by the republication of the will. 636
28. Will pronounced against both attesting witnesses deposing against a signature according to the requisites of the 9th section of 1st Vict. c. 26, and there being no circumstances on which the Court could found a presumption that the recollection of the witnesses was infirm on the subject. 642
29. 1st Vict. c. 29, s. 9. A will must be signed by a testator before it is subscribed by witnesses. Will held, upon the circumstances to have been signed before the witnesses subscribed, although one witness deposed, that the testator signed *after* he and his fellow witness had subscribed, and the other witness deposed, that the part of the will, where the signature of the testator was written was blank when she subscribed. 648
30. Special probate of will and codicil cancelled, (the former inadvertently,) the latter by the supposed assent of a testator, not competent at the time to give directions for such cancellation. 737
31. Will lost, motion to admit a verified copy to probate, rejected, the next of kin not having been cited. 741
32. A married woman had power to dispose of certain stock and furniture by a will to be executed in the presence of two witnesses; and also to dispose of other effects by will generally. By a will, duly executed, she disposed of the stock and furniture; by an unsigned memorandum, at the foot of her will, in her own handwriting, (previous to the 1st of January, 1838,) she disposed of the other effects. Letters of administration with the will and memorandum granted. 744
33. A will, (dated 1841,) revoking all former wills, referred to a clause in a former will. Probate prayed of so much of the former will as was necessary to explain the latter will. Motion refused. 746
34. Will signed at the end of the first side of a sheet of paper, and attested on the second side,

- admitted to probate, on evidence of acknowledgment of the signature of the testator. 748
35. A will written on the lower half of the second side of a sheet of paper, was presented (the sheet being folded broadways,) to the witnesses, and was signed and subscribed on the lower half of the first side, (the witnesses believing the will to be contained on the upper half of the first side.) Probate granted, with the consent of the next of kin. 750
36. A will prepared for a party, who from paralysis had lost the use of speech, and almost of his limbs, signed with a mark, and duly attested, pronounced for. 752
37. Will prepared and executed on a printed form; motion for probate rejected. Testator misled by printed directions. 754
38. A testatrix produced a codicil, all in her own handwriting, and with her signature made thereto, to two witnesses, present at the same time, who, at her request, made their marks thereto; the testatrix wrote the names of the witnesses opposite their respective marks, and, by mistake, a wrong surname to one of them. Probate granted. 756
39. Dispositive part of a will written on the first side of a sheet of paper, the second side blank, an attestation clause, signature of the testator, and subscription of witnesses on the third side. Probate granted. 758
40. A testatrix obliterated, *animo revocandi*, several passages of her will, so that none of the

- parts obliterated could be distinguished upon the face of the will. *Held*, that this was a complete revocation within the meaning of the 1st Vict. c. 26, s. 21. 761
41. A testator, in the year 1832, made a will and codicil, and, in March, 1836, a second codicil. In October, 1836, he executed a new will, prepared by his solicitor, and which was delivered into his own possession. At his death, the will of 1836 could not be found. *Held*, that the effect of the execution of the later will was to revoke the prior will and codicils, and that the subsequent destruction of the second will by the testator, (so presumed from it having been delivered into his possession, and not being forthcoming), did not *per se* operate to revive the first will and codicils. 770
42. Paper, propounded as a codicil, rejected, as not being *per se* of a testamentary character, and the internal defect of the instrument not being supplied by evidence. 787
43. Will of a soldier made when quartered with his regiment in barracks, at New Brunswick, and who died there, not admitted to probate, not being executed according to the 9th section of the 1st Vict. c. 26, and not being within the exception contained in the 11th section. 818

WITNESS,

See EVIDENCE.

PRACTICE, 8—12.

1. In weighing the testimony of

witnesses naturally biassed, the rule is, to give credit to their statements of facts, and to view their deductions from facts with suspicion. 96

2. The evidence of one witness, although *omni exceptione major*, is not sufficient to support a testamentary paper purporting to be duly executed and attested, where there are no adminicular circumstances tending to confirm it, and where the probabilities of the case incline against the factum of such an instrument. 125

3. A paper admitted to probate, on the testimony of one of the two attesting witnesses, although the other witness deposed, that it was not signed by the testator in his presence, the circumstances of the case inclining to favour the supposition of a due execution, *e. g.*, a formal attestation clause; and the first witness having, in an affidavit sworn a few days after the will was made, deposed to a due execution, the second witness not having been examined until two years and a half afterwards. 151

THE END.

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